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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969/1970

No. 89

ALTON J. LEMON, ET AL., APPELLANTS

v.

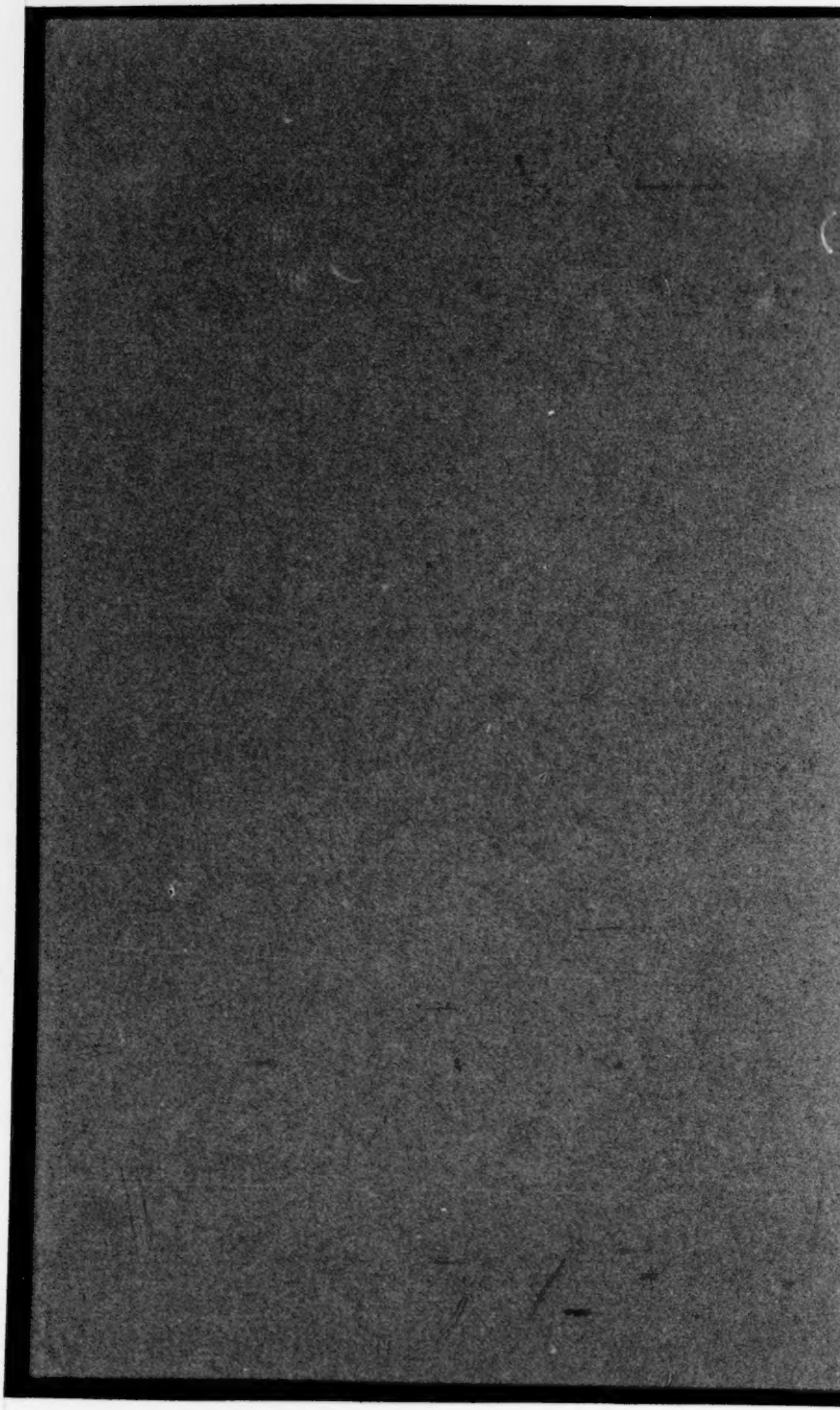
DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL., APPELLEES

AND

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS, INTERVENOR-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED FEBRUARY 16, 1970
JURISDICTION NOTED APRIL 20, 1970



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APPENDIX.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY AND BETH JACOBS SCHOOLS OF PHILADELPHIA

For plaintiff:

Henry W. Sawyer III

(Duane, Morris & Heckscher for applicant for intervention as deft. Pennsylvania Association of Independent Schools)

For defendant:

William C. Sennett—Edward Friedman for David H. Kurtzman, Grace M. Sloan

Semisch & Commons, 408 N. Easton Rd., Willow Grove Pa. 19090 for Phila. Montgomery Christian Academy

Samuel Rappaport for Akiba Hebrew Academy & Beth Jacob School of Phila.

William B. Ball—Joseph G. Skelly, 127 State St., Harrisburg Pa. 17101 for Archbishop Wood High School for Girls

James E. Gallagher Jr.—C. Clark Hodgson Jr. for St. Anthony's Roman Catholic Church School and Ukrainian Catholic Holy Ghost School

F. Raymond Heuges for Germantown Lutheran Acad.

DOCKET ENTRIES.

June 3, 1969. Complaint filed.

June 3, 1969. Summons exit.

June 3, 1969. Plffs. motion for Preliminary Injunction, filed.

June 9, 1969. Order Hastie Chief Judge Third Judicial Circuit designating Judge Francis L. Van Dusen and District Judge Alfred L. Luongo to sit with District Judge E. Mac Troutman as members of the court for hearing and determination of this action, filed.
6-11-69 entered

June 17, 1969. Order amending order constituting a three judge court substituting Chief Judge William H. Hastie to sit with District Judge Alfred L. Luongo and Judge E. Mac Troutman, filed.
6-18-69 entered

June 18, 1969. Appearance of William C. Sennett Esq. and Edward Friedman Esq. for Davis H. Kurtzman et al, filed.

June 18, 1969. Appearance of Semisch & Commons Esq. for Phila. Montgomery Christian Academy, filed.

June 19, 1969. Appearance of Samuel Rappaport Esq. for Akiba Hebrew Academy et al., filed.

June 19, 1969. Appearance of William B. Ball Esq. Joseph G. Skelly Esq. for Archbishop Wood High School for Girls, filed.

June 19, 1969. Appearance of James E. Gallagher Jr. Esq. C. Clark Hodgson Jr. Esq. for St. Anthony's Roman Catholic Church School et al., filed.

June 23, 1969. Appearance of F. Raymond Heuges, Esq. for Germantown Lutheran Academy, filed.

June 25, 1969. Motion of St. Anthony's Roman Catholic School and Ukrainian Catholic Holy Ghost School et al. for extension of time to file an answer, etc., filed.

June 25, 1969. Order that time for Defts. to answer, etc. is EXTENDED to 8/10/69, filed. 6/27/69 entered and copies mailed per C. C. Hodgson, Jr., Esq.

June 27, 1969. Defts. motion for and Order EXTENDING time for all defts. to answer etc. to Aug. 10, 1969, filed.

6/30/69 entered and copies mailed

July 7, 1969. Plffs.' interrogatories to defts. other than David Kurtzman & Grace Sloan, filed.

July 7, 1969. Plffs.' motion under Rule 34 for Production of Documents, filed.

July 25, 1969. Deft. Schools' motion to dismiss complaint for failure of plffs. to have standing to sue, filed.

July 25, 1969. Deft. Schools' motion to dismiss complaint for failure to state a claim upon which relief can be granted, filed.

July 25, 1969. Deft. Schools' motion under Rule 23(c), filed.

July 25, 1969. Deft. Schools' motion to strike paragraph five of plffs. complaint and for a more definite statement, filed.

July 30, 1969. Appearance of Duane, Morris & Heckscher, Esq. for applicant for intervention as a party deft. Pennsylvania Association of Independent Schools, filed.

July 30, 1969. Motion of The Pennsylvania Association of Independent Schools to intervene as a party deft., filed.

July 31, 1969. Motion of David H. Kurtzman, et al, to dismiss, filed.

July 31, 1969. Plffs.' memorandum respecting defts.' motion to dismiss for failure to state a cause of action, filed.

Aug. 5, 1969. Plffs. answer to defts. motion under Rule 23(c), filed.

Aug. 19, 1969. Deft. Schools' motion to dismiss the Complaint, filed.

Aug. 20, 1969. Summons returned: "On 6/24/69 served David H. Kurtzman; on 6/9/69 served Beth Jacob Schools, Archbishop Woods Girls High School, Ger-

mantown Lutheran Academy, Akiba Hebrew Academy, Phila. Montgomery Christian Academy, on 6/10/69 served St. Anthony's Roman Catholic School, Ukrainian Catholic Holy Ghost School; and on 6/11/69 served Grace Sloan" and filed.

Aug. 20, 1969. Pretrial Order GRANTING motion of Pa. Association of Independent Schools to intervene as a party deft. re argument on defts' motion to dismiss, without prejudice for more general intervention after disposition of motions; Defts' motions to dismiss for failure to state a cause of action, for failure to have standing to sue, and Defts' motions to strike a portion of the complaint shall be listed for argument at a date to be fixed by the Court; Defts' objections to plffs' interrogatories to be filed within 30 days, etc.; Vincent J. McCoola to be deposed before 10/1/69; that this action shall not be maintained as a class action; and that the last sentence of paragraph 7 of the complaint and similar allegations need not be answered by defts., filed. 8/22/69 entered and copies mailed.

Sept. 18, 1969. Objections of Germantown Lutheran Academy to plffs. interrogatories, filed.

Sept. 19, 1969. Objections of Phila. Montg. Christian Academy to plffs. interrogatories, filed.

Sept. 19, 1969. Objections of Akiba Hebrew Academy and Beth Jacob School to plff's interrogatories, filed.

Sept. 19, 1969. Objections of Archbishop Wood High School for Girls, et al. to plffs. interrogatories, filed.

Sept. 22, 1969. Deft. Schools' memorandum of law on the propriety of a three judge court, filed.

Sept. 22, 1969. Brief in support of deft. Schools' motion to strike paragraph five and for a more definite statement, filed.

Sept. 22, 1969. Brief in support of deft. Schools' motion to dismiss plffs. complaint for failure to state a claim upon which relief can be granted, filed.

Sept. 22, 1969. Brief in support of motion to dismiss plffs. complaint for failure of plffs. to have standing to sue, filed.

Sept. 22, 1969. Brief on motion to dismiss of deft. State Officials Kurtzman and Sloan, filed.

Oct. 1, 1969. Brief in response to defts. motion to dismiss for lack of standing, filed.

Oct. 1, 1969. Plffs. memorandum on the necessity of a three-judge court, filed.

Oct. 1, 1969. Plffs. memorandum contra defts. motion to dismiss, filed.

Oct. 7, 1969. Deft. Schools reply brief on motion to dismiss for failure to state a claim, filed.

Oct. 7, 1969. Deft. Schools reply brief on motion to dismiss for lack of standing, filed.

Oct. 13, 1969. Argued sur defts. motion to dismiss; defts. motion re 3-judge court and defts. motion to strike parts of complaint.

Oct. 13, 1969. Petition and Order granting leave to Penna. Assoc. of Independent Schools to file brief, filed. (10/14/69 entered.)

Oct. 16, 1969. Amended complaint, filed.

Oct. 16, 1969. Transcript of Oct. 13, 1969, filed.

Oct. 24, 1969. Deft. Schools' motion to strike representative allegations of the complaint and the amended complaint, or in the alternative, for a hearing under Rule 23(c), filed.

Oct. 24, 1969. Plffs. interrogatories to D. H. Kurtzman, filed.

Nov. 4, 1969. Attorney General's supplemental memorandum of law, filed.

Nov. 28, 1969. Opinion Troutman J. and Luongo J. and Order that defts.' motion to dismiss the complaint as to the organizational plffs. for lack of standing on all issues raised herein is GRANTED, defts. motion to dismiss complaint as to plffs. Lemon for lack of standing under the religious clauses of the First Amendment is DENIED; defts. motion to dismiss complaint as to remaining individual plffs. Priscilla Reardon and Betty J. Worrell, for lack of standing as taxpayers under the establishment clause is GRANTED; defts. motion to dismiss complaint as to individual plffs. for lack of standing under the free-exercise clause is DENIED, defts. motion to dismiss complaint as to all individual plffs. for lack of standing under equal protection clause is GRANTED and defts. motion to dismiss the complaint for failure of all plffs. to state a claim upon which relief can be granted is GRANTED AND dissenting Hastie Chief Circuit Judge, filed. (11-28-69 entered & notice mailed.)

Dec. 18, 1969. Notice of appeal by plffs. to the Supreme Court of the United States, and certificate of service, filed.

Jan. 20, 1970. Certified copy of record transmitted to Supreme Court of U. S.

Apr. 30, 1970. Certified copy of Order of Supreme Court of the U. S. stating that probable jurisdiction is noted and the case placed on the summary calendar, filed. (Copies to JJ. Troutman, Luongo and Hastie.)

COMPLAINT.

(Title Omitted in Printing.)

I. Statement as to Jurisdiction.

1. This is a civil action brought by the plaintiffs on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the Commonwealth of Pennsylvania for the support of, or to finance in whole or in part sectarian schools and other private schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion, and to declare such use as violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U. S. Code, Sections 1331, 1343, 2281, 2283, 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000) Dollars, as more fully appears hereinafter.

4. Each of the organizational plaintiffs is an association of persons resident in the Commonwealth of Pennsylvania, some of which individuals, in each case, are resident in the Eastern District of the Commonwealth of Pennsylvania and all of which organizations carry on activities in the Eastern District of Pennsylvania. All of the organizational plaintiffs share as a common objective the separation of church and state and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion.

The National Association for the Advancement of Colored People, with which the plaintiff Pennsylvania State Conference of the National Association for the Advancement of Colored People is affiliated, is an organization whose purpose it is to seek the elimination of racial discrimination through resort to judicial proceedings and otherwise.

5. Non-public schools, including the defendant schools are, de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost, or residential pattern, and the aid rendered to such schools will perpetuate and promote such racial segregation in that said subsidy will further enable private schools to increase their enrollment, which increase in enrollment will be exclusively or almost exclusively white which, in turn, will increase the percentage of Negro enrollment in the public schools, thus aggrevating said de facto segregation and, in turn, strengthening the preference of many white parents to enroll their children in non-public schools (by reason of the racial prejudice of said parents or because the public schools will necessarily become inferior by reason of obtaining a smaller percentage of the total funds which the community is prepared to commit for education), which will, in turn, generate political presures for even greater tax aid to private schools, justified by their increased enrollment, with the ultimate result of promoting two school systems in the Eastern District of Pennsylvania—a public school system predominantly black, poor and inferior, and a non-public school system predominantly white, affluent and superior.

6. Each of the individual plaintiffs is a citizen and taxpayer in the United States and in the Commonwealth of Pennsylvania and is resident in the Eastern District of Pennsylvania. Plaintiff Alton J. Lemon is a Negro parent of a child attending a public school in Pennsylvania and sues herein in his own behalf and in behalf of others simi-

larly situated. It is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools.

7. Defendant David H. Kurtzman is Superintendent of Public Instruction of the Commonwealth of Pennsylvania and is sued herein in that capacity. Defendant Grace Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued herein in that capacity. Each of the institutional defendants is a secrtarian educational institution at the elementary or secondary level situated and operating within the Eastern District of Pennsylvania. They are sued herein as representative of all sectarian educational institutions in the Commonwealth of Pennsylvania and of all educational institutions in the Commonwealth of Pennsylvania whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion, the number of such sectarian and other educational institutions being too numerous to be conveniently joined as defendants in this suit.

II. Factual Allegations.

8. On June 19, 1968 the Governor of the Commonwealth of Pennsylvania signed into law Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, effective July 1, 1968, hereinafter referred to as the Act. (The text of the Act is set forth herein as Appendix A.) The Act purports to empower the State Superintendent of Public Instruction to contract for the purchase of secular education services from non-public schools located in the Commonwealth of Pennsylvania and authorizes him to promulgate rules and regulations to effectuate this purpose.

9. The Act further provides that revenues from State harness racing and State horse racing shall be used to finance the operations of the Act.

10. All revenues from State harness racing and State horse racing are funds which are the sole property of the Commonwealth of Pennsylvania.

11. In December, 1968 the defendant, David H. Kurtzman, in his capacity as State Superintendent of Public Instruction of the Commonwealth of Pennsylvania and acting pursuant to the authority of the Act, issued Rules and Regulations for the effectuation of the purposes of the Act.

12. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payment thereunder for "secular educational services" which are furnished as part of the regular program and curriculum of the respective schools and are limited to children regularly enrolled as pupils in the said schools and subject to the sectarian discipline and teaching of said schools.

13. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payment thereunder to sectarian educational institutions which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, and (3) conduct their operations, curriculums and programs to fulfill that purpose. On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are sectarian educational institutions which are (1) controlled by churches or religious organizations, (2) have as their purpose the

teaching, propagation and promotion of a particular religious faith, and (3) conduct their operations, curriculums and programs to fulfill that purpose.

14. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payments thereunder to private schools whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion. On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are private institutions whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion.

15. The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer authorizes payments thereunder to private schools which, by purpose or effect, discriminate by reason of race or religion in the employment of teachers and other persons to administer the educational services rendered by the school, including the educational services specified in the Act. On information and belief, each of the institutional defendants herein and most of the other educational institutions which have applied for payments under the Act are private institutions which, by purpose or effect, discriminate by reason of race or religion in the employment of teachers and other persons to administer the educational services specified in the Act.

16. Each of the institutional defendants has applied to the defendant State Superintendent of Public Instruction for payments under the Act as follows:

St. Anthony's Roman Catholic School West Third Street Chester, Pennsylvania	$ 2,444.31
Archbishop Woods Girls High School 655 York Road Warminster, Pennsylvania	46,447.21
Ukrainian Catholic Holy Ghost School Third and Booth Streets Chester, Pennsylvania	5,680.85
Germantown Lutheran Academy School House Lane and Green Street Philadelphia, Pennsylvania	31,775.00
Akiba Hebrew Academy 223 N. Highland Avenue Merion Station, Pennsylvania	88,022.67
Philadelphia Montgomery Christian Academy Greenwood Avenue Wyncote, Pennsylvania	32,308.00
Beth Jacobs Schools of Philadelphia Germantown Branch 143 W. Walnut Lane Philadelphia, Pennsylvania	67,700.00

Other private and sectarian educational institutions have applied for payments under the Act in the total amount of $16,833,884.32.

17. Unless enjoined by this Court the defendant State Superintendent of Public Instruction will approve for payment and the defendant State Treasurer will pay all or part of said sums to the respective private and sectarian schools and will in the future continue to pay large sums in effectuation of the purposes of the Act.

III. Causes of Action.

18. *First Count:* The Pennsylvania Nonpublic Elementary and Secondary Education Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer is a law respecting an establishment of religion in violation of the First Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment in that it (a) provides for direct financial aid out of state funds to sectarian schools, (b) finances and participates in the blending of sectarian and secular instruction, (c) has as its purpose the advancement of religion, and (d) has as its primary effect the advancement of religion.

19. *Second Count:* The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the State Treasurer prohibits the free exercise of religion on the part of the individual plaintiffs by reason of the fact that it constitutes compulsory taxation for the support of religion or religious education institutions.

20. *Third Count:* The Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer violates the Fourteenth Amendment to the United States Constiution in that it constitutes a denial of the equal protection of the laws.

IV. Other Allegations.

21. This suit involves a genuine case or controversy between the plaintiffs and the defendants.

22. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

23. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the U. S. Code to declare unconstitutional the Pennsylvania Nonpublic Elementary and Secondary Education Act on its face and as applied by the defendant State Superintendent of Public Instruction and the defendant State Treasurer.

(2) That the defendant State Superintendent of Public Instruction be enjoined from approving the payment of any funds under the Act or otherwise participating in its administration, and the defendant State Treasurer be enjoined from paying any funds pursuant to the Act.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

June, 1969

/s/ Henry W. Sawyer, III,
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APPENDIX "A" TO COMPLAINT

PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT

Introduced as H. 2170 December 12, 1967. Amended by Senate June 11, 1968. Signed into law June 19, 1968.

AN ACT

To promote the welfare of the people of the Commonwealth of Pennsylvania; to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools; creating a Nonpublic Elementary and Secondary Education Fund to finance the purchase of secular educational services from nonpublic schools located within the Commonwealth of Pennsylvania for the benefit of residents of the Commonwealth of Pennsylvania; authorizing the Superintendent of Public Instruction to enter into contracts to carry out the intent and purposes of this act, and to establish such rules and regulations as are necessary; providing for the payment of administrative costs incident to the operation of the act; providing procedures for reimbursement in payment for the rendering of secular educational service; and designating a portion of revenues of the State Harness Racing Fund and of the State Horse Racing Fund as the sources of funds.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Nonpublic Elementary and Secondary Education Act."

Section 2. Legislative Finding; Declaration of Policy. —It is hereby determined and declared as a matter of legislative finding—

(1) That a crisis in elementary and secondary education exists in the Nation and in the Commonwealth involving (i) the new recognition of our intellectual and cultural resources as prime national assets and of the national imperative now to spur the maximum educational development of every young American's capacity; (ii) rapidly increasing costs occasioned by the rise in school population, consequent demands for more teachers and facilities, new but costly demands, in the endeavor for excellence, upon education generally; the general impact of inflation upon the economy; and the struggle of the Commonwealth, commonly with many other states, to find sources by which to finance education, while also attempting to bear the mounting financial burden of the many other areas of modern State governmental responsibility;

(2) That nonpublic education in the Commonwealth today, as during past recent decades, bears the burden of educating more than twenty per cent of all elementary and secondary school pupils in Pennsylvania; that the requirements of the compulsory school attendance laws of the Commonwealth are fulfilled through nonpublic education;

(3) That the elementary and secondary education of children is today recognized as a public welfare purpose; that nonpublic education, through providing instruction in secular subjects, makes an important contribution to the achieving of such public welfare purpose; that the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through nonpublic education;

(4) That freedom to choose nonpublic education meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right;

(5) That the Commonwealth has the right and freedom, in the fulfillment of its duties, to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian;

(6) That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania; that such hazard to the education of children may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools.

Section 3. Definitions.—The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise;

(1) "Nonpublic Elementary and Secondary Education Fund" shall mean the fund created by this act.

(2) "Secular educational service" shall mean the providing of instruction in a secular subject.

(3) "Secular subject" shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect.

(4) "Nonpublic school" shall mean any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law.

(5) "Purchase secular educational service" shall mean the purchase by the Superintendent of Public Instruction from a nonpublic school, pursuant to contract, of secular educational service at the reasonable cost thereof.

(6) "Reasonable cost" shall mean the actual cost to a nonpublic school of providing a secular educational service and shall be deemed to include solely the cost pertaining thereto of teachers' salaries, textbooks and instructional materials.

Section 4. Nonpublic Elementary and Secondary Education Fund.—There is hereby created for the special purpose of this act a Nonpublic Elementary and Secondary Education Fund dedicated to the particular use of purchasing secular educational service consisting of courses solely in the following subjects: mathematics, modern foreign languages, physical science, and physical education, provided, however, that as a condition for payment by the Superintendent of Public Instruction for secular educational service rendered hereunder, the Superintendent of Public Instruction shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification ap-

proved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition.

Section 5. Administration.—The administration of this act shall be under the direction of the Superintendent of Public Instruction, who shall establish rules and regulations pertaining thereto, make contracts of every name and number, and execute all instruments necessary or convenient for the purchase of secular educational service hereunder. All expenses incurred in connection with the administration of this act shall be paid solely out of the Nonpublic Elementary and Secondary Education Fund and no money raised for the support of the public schools of the Commonwealth shall be used in connection with the administration of this act.

Section 6. Moneys for Fund.—(a) Permanent moneys. Into the Nonpublic Elementary and Secondary Education Fund shall be paid each year:

(1) All proceeds from horse racing up to the first ten million dollars ($10,000,000) realized by the State Horse Racing Fund established by the act of December 11, 1967 (Act No. 331), remaining after, and not required for, payment of all of the items of administrative cost set forth in subsection (b) of Section 18 of that act, plus

(2) One-half of all such horse racing proceeds in excess of the sum of ten million dollars ($10,000,000), the remaining half thereof to be paid into the General Fund.

(b) Temporary moneys. Until the time that proceeds in the amount of ten million dollars ($10,000,000) shall, in a given fiscal year, have paid into the Nonpublic Elementary

and Secondary Education Fund as provided for under subsection (a) of Section 6 hereof, three-fourths of the proceeds from harness racing realized by the State Harness Racing Fund established by the act of December 22, 1959 (P. L. 1978), as amended, remaining after and not required for, the payments provided for in subsections (b) and (d) of Section 16 of that act, shall be paid into the Nonpublic Elementary and Secondary Education Fund according to the following formula:

(1) The entire three-fourths of the harness racing proceeds for any fiscal year shall be paid into the Nonpublic Elementary and Secondary Education Fund until such year as the horse racing proceeds designated by this section for the said fund are of such amount that, combined with the harness racing proceeds, the sum of ten million dollars ($10,000,000) shall have been realized by the Nonpublic Elementary and Secondary Education Fund.

(2) Proceeds from harness racing shall cease to be paid into the Nonpublic Elementary and Secondary Education Fund for any fiscal year in which proceeds from horse racing, designated by this section for the Nonpublic Elementary and Secondary Education Fund, shall equal ten million dollars ($10,000,00).

Moneys in the Nonpublic Elementary and Secondary Education Fund are hereby appropriated to the Department of Public Instruction to be used by the Superintendent of Public Instruction solely for the purchase of secular educational service hereunder and administrative exepenses pertaining thereto as provided for in Section 5 of this act.

Section 7. Reimbursement Procedures.—(a) Requests for reimbursement in payment for the purchase of secular educational service hereunder shall be made on such forms

and under such conditions as the Superintendent of Public Instruction shall prescribe. Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such accounts shall be subject to audit by the Auditor General. Reimbursement payments shall be made by the Superintendent of Public Instruction in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered.

(b) Reimbursements for any fiscal year for the purchase of secular educational service hereunder shall not exceed the total amount of the moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund in that fiscal year.

(c) In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Nonpublic Elementary and Secondary Education Fund shall be insufficient to pay the total amount of validated requests hereunder in reimbursement for that year, reimbursements shall be made in that proportion which the total amount of such requests bears to the total amount of moneys in the Nonpublic Elementary and Secondary Education Fund.

(d) The Budget Secretary shall, by July fifteenth of each year, certify to the Superintendent of Public Instruction, the total amount of money in the Nonpublic Elementary and Secondary Education Fund.

Section 8. Effective Date.—This act shall take effect July 1, 1968.

Section 9. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect, in all valid applications that are severable from the invalid applications.

MOTION FOR PRELIMINARY INJUNCTION.

(Title omitted in printing.)

Plaintiffs move the Court for a preliminary injunction enjoining the defendants Superintendent of Public Instruction and State Treasurer of the Commonwealth of Pennsylvania, pending determination of the above-captioned matter, from paying or processing for paying any funds pursuant to the Pennsylvania Nonpublic Elementary and Secondary Education Act.

HENRY W. SAWYER, III
Henry W. Sawyer, III

DEFENDANT SCHOOLS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE.

(Title omitted in printing.)

All Defendant schools respectfully move the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendants' favor on the ground that Plaintiffs do not have standing to maintain this action.

In support thereof, Defendants assign the following reasons:

I.

Individual Plaintiffs
ALTON J. LEMON, PRISCILLA REARDON and BETTY J. WORRELL.

1. The Complaint fails to allege that any of these Plaintiffs have contributed to the State harness racing or horse racing funds. Such funds are the sole source under the Act, out of which the Commonwealth purchases secular educational services.

2. The Complaint fails to allege facts which demonstrate the extent to which, if any, these Plaintiffs suffer any adverse financial effect resulting from the use of State harness racing or horse racing funds, with which the Commonwealth purchases secular educational services under the Act.

3. The Complaint fails to allege that the collection of funds by the Commonwealth for purchases under the Act

from persons who choose to attend harness and horse racing constitutes a program of taxation to which these Plaintiffs were compelled to contribute.

4. The Complaint fails to allege that any funds have been expended under the Act, except as incidental to purely regulatory activity.

5. The Complaint fails to allege facts sufficient to demonstrate that Plaintiff, Alton J. Lemon, has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue on behalf of all other persons similarly situated.

II.

Organizational Plaintiffs.
PENNSYLVANIA STATE EDUCATION ASSOCIATION,
PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
PENNSYLVANIA COUNCIL OF CHURCHES,
PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

6. Defendants incorporate herein by reference paragraphs 1, 2, 3, and 4 of this Motion, all of which apply with equal force to the Plaintiff organizations.

7. The Complaint fails to allege that any of these Plaintiff organizations are taxpayers.

8. The Complaint fails to allege that the Plaintiff organizations have a personal stake in the outcome of this litigation, apart from a common motivation to act as voluntary protectors of the public interest, or as "private attorneys general." The sharing of common viewpoints (Complaint, Paragraph 4) does not constitute an interest which entitles the Plaintiff organizations to complain herein.

9. The Complaint fails to allege any facts sufficient to show that the Plaintiff organizations bring this action due to circumstances rendering it impossible or perilous for any one of their respective members to sue.

10. The Complaint fails to allege facts showing that Plaintiffs Pennsylvania State Education Association or Pennsylvania Conference National Association for the Advancement of Colored People possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to the concept of freedom of religion or the governmental establishment of religion.

11. The Complaint fails to allege facts showing that any of the Plaintiff organizations, except the Pennsylvania Conference National Association for the Advancement of Colored People, possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to racial segregation.

12. The undersigned are authorized to state that all the Defendant schools join in the foregoing Motion.

WHEREFORE, Defendant schools respectfully pray the Court to enter an Order dismissing Plaintiffs' Complaint and to enter a Judgment of Dismissal in Defendants' favor.

BALL & SKELLY,
WILLIAM B. BALL,
Attorney for Defendant Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR. AND
C. CLARK HODGSON, JR.,
C. CLARK HODGSON, JR.,
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

DEFENDANT SCHOOLS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE.

(Title Omitted in Printing.)

AMENDED MOTION.

All Defendant schools respectfully move the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendants' favor on the ground that Plaintiffs do not have standing to maintain this action.

In support thereof, Defendants assign the following reasons:

I.

Individual Plaintiffs.
ALTON J. LEMON, PRISCILLA REARDON and BETTY J. WORRELL.

1. The Complaint fails to allege that any of these Plaintiffs have contributed to the State harness racing or horse racing funds. Such funds are the sole source under the Act, out of which the Commonwealth purchases secular educational services.

2. The Complaint fails to allege facts which demonstrate the extent to which, if any, these Plaintiffs suffer any adverse financial effect resulting from the use of State harness racing or horse racing funds, with which the Commonwealth purchases secular educational services under the Act.

3. The Complaint fails to allege that the collection of funds by the Commonwealth for purchases under the Act from persons who choose to attend harness and horse racing constitutes a program of taxation to which these Plaintiffs were compelled to contribute.

4. The Complaint fails to allege that any funds have been expended under the Act, except as incidental to purely regulatory activity.

5. The Complaint fails to allege facts sufficient to demonstrate that Plaintiff, Alton J. Lemon, has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue on behalf of all other persons similarly situated.

5A. The Complaint fails to allege any facts showing a personal stake, or adverse interest, on the part of these Plaintiffs on the issue of the denial of the equal protection of the laws.

II.

Organizational Plaintiffs.

PENNSYLVANIA STATE EDUCATION ASSOCIATION,
PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
PENNSYLVANIA COUNCIL OF CHURCHES,
PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

6. Defendants incorporate herein by reference paragraphs 1, 2, 3, and 4 of this Motion, all of which apply with equal force to the Plaintiff organizations.

7. The Complaint fails to allege that any of these Plaintiff organizations are taxpayers.

8. The Complaint fails to allege that the Plaintiff organizations have a personal stake in the outcome of this litigation, apart from a common motivation to act as voluntary protectors of the public interest, or as "private attorneys general". The sharing of common viewpoints (Complaint, Paragraph 4) does not constitute an interest which entitles the Plaintiff organizations to complain herein.

9. The Complaint fails to allege any facts sufficient to show that the Plaintiff organizations bring this action due to circumstances rendering it impossible or perilous for any one of their respective members to sue.

10. The Complaint fails to allege facts showing that Plaintiffs Pennsylvania State Education Association or Pennsylvania Conference National Association for the Advancement of Colored People possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to the concept of freedom of religion or the governmental establishment of religion.

11. The Complaint fails to allege facts showing that any of the Plaintiff organizations, except the Pennsylvania Conference National Association for the Advancement of Colored People, possess specific organizational purposes and objectives expressly relating to their interest and competence with respect to racial segregation.

11A. The Complaint fails to allege any facts showing a personal stake, or adverse interest, on the part of these Plaintiffs on the issue of the denial of the equal protection of the laws.

12. The undersigned are authorized to state that all the Defendant schools join in the foregoing Motion.

WHEREFORE, Defendant schools respectfully pray the Court to enter an Order dismissing Plaintiffs' Complaint and to enter a Judgment of Dismissal in Defendants' favor.

BALL & SKELLY,
WILLIAM B. BALL,
Attorney for Defendant Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR. AND
C. CLARK HODGSON, JR.,
JAMES E. GALLAGHER, JR.
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

DEFENDANT SCHOOLS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

(Title Omitted in Printing.)

Defendant schools respectfully move the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendants' favor. In support thereof, Defendants assign the following reasons:

I.

FIRST COUNT.
PARAGRAPH 18—ESTABLISHMENT OF RELIGION.

1. The allegation, "(a)", of Paragraph 18, that the Act is unconstitutional on its face and as applied because it "provides for direct financial aid out of State funds to sectarian schools" fails to state a claim since the Act, which expresses the public policy of the Commonwealth, achieves solely the public and secular legislative purpose of providing secular education to students.

2. The allegation, "(b)", of Paragraph 18, that the Act is unconstitutional on its face and as applied because it "finances and participates in the blending of sectarian and secular instruction" fails to state a claim since the Act has an express secular legislative purpose and a primary effect which does not advance religion.

3. The Complaint fails to allege any facts sufficient to support the bare conclusory assertion made in "(c)" of Paragraph 18, that the Act, on its face, "has as its purpose the advancement of religion".

4. The allegation, "(c)" of Paragraph 18, that the Act is unconstitutional *as applied* because it "has as its purpose the advancement of religion" fails to state a claim because the constitutionality of the *application* of a statute is not determined by the constitutionality of its stated or implied purpose.

5. The allegation, "(d)" of Paragraph 18, that the Act is unconstitutional *on its face* because it "has as its primary effect the advancement of religion" fails to state a claim because the effects of a statute's application do not determine the constitutionality of the statute on its face.

6. The Complaint fails to allege any facts sufficient to support the bare conclusory assertion made in "(d)" of Paragraph 18, that the Act "has as its primary effect the advancement of religion".

II.

SECOND COUNT
PARAGRAPH 19—FREE EXERCISE OF RELIGION.

7. The Complaint fails to allege facts sufficient to show that the Act on its face "constitutes compulsory taxation", as alleged in Paragraph 19. Collections pursuant to the Act, with which the Commonwealth will make purchases under the Act, are from persons who freely choose to attend horse and harness races and does not constitute a program of compulsory taxation.

8. The Complaint fails to allege facts sufficient to show that the Act on its face requires or permits support of religion or religious educational institutions.

9. The allegation of Paragraph 19, that the Act is unconstitutional as applied because it "constitutes compulsory taxation for the support of religion or religious educational institutions" is insufficient as a matter of law, in that the Act, expressing the public policy of the Commonwealth, achieves solely the public and secular legislative purpose of providing secular education to students.

III.

THIRD COUNT.
PARAGRAPH 20—EQUAL PROTECTION OF THE LAWS.

10. The Complaint fails to allege that the Act on its face, either expressly or by implication, requires or permits any discriminatory State action.

11. The Complaint fails to allege facts sufficient to show that the Act, as applied, results in any discriminatory State action.

12. The Complaint fails to allege either expressly or by implication that the Act requires or permits an invidious classification or discrimination of any kind based upon race.

13. The allegations of the Complaint that the Commonwealth pays subsidy to schools which are de facto racially segregated fails to constitute an allegation of a denial of the equal protection of the laws.

14. The undersigned are authorized to state all the Defendant schools join in the foregoing Motion.

WHEREFORE, Defendant schools respectfully pray the Court to enter an Order dismissing Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and to enter a Judgment of Dismissal in Defendants' favor.

BALL & SKELLY,

WILLIAM B. BALL,
Attorneys for Defendant, Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR., and
C. CLARK HODGSON, JR.,

C. CLARK HODGSON, JR.,
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

DEFENDANT SCHOOLS' MOTION UNDER RULE 23(c).

(Title omitted in printing.)

Defendant schools respectfully move the Court for a determination under Rule 23(c) that this action shall not be maintained as a class action, and assigns therefor the following reasons:

1. In paragraph seven of the Complaint, Plaintiffs allege that the Defendant schools are sued in this action "as representative of all sectarian educational institutions in the Commonwealth of Pennsylvania and of all educational institutions in the Commonwealth of Pennsylvania whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion. . . ."

2. The statewide group thus described in the Complaint does not constitute a class in relation to the three causes of action stated in the Complaint. The group includes sectarian schools, inter-denominational schools, non-sectarian schools, public schools, non-public schools, kindergartens, elementary schools, secondary schools, institutions of higher learning, schools for exceptional children, professional schools, trade schools, business schools and seminaries, that is, schools having in common solely the fact that they are educational institutions in the Commonwealth of Pennsylvania.

3. As to each of the causes of action set forth in the Complaint, no finding of fact respecting how the Act is applied in any one of the Defendant schools can be a finding of fact which is binding on any other Defendant school or any other member of the alleged class, including all schools under contract with the Commonwealth pursuant to the Act.

4. There are 1181 schools located in 55 out of the 67 counties of Pennsylvania which have entered into individual contracts with the Commonwealth under the Act. Among these schools, there exists an extremely wide diversity respecting religion and race, educational policies, instructional practices, admissions policies, responses to needs of the particular community served, courses offered and faculty membership.

5. As among the Defendant schools, there are questions of law and fact, respecting each cause of action, not common to all of these schools.

6. As between the Defendant schools, and the other members of the alleged class (including all schools under contract with the Commonwealth pursuant to the Act) there are questions of law and fact respecting each cause of action, not common to all.

7. The defenses of the Defendant schools are not typical of the defenses that might be asserted by members of the alleged class (including all schools under contract with the Commonwealth pursuant to the Act) of which the Defendant schools are alleged to be representative.

8. The Defendant schools cannot adequately protect the interests of the members of the alleged class, including all schools under contract with the Commonwealth pursuant to the Act.

9. Plaintiffs, having sued the Defendant schools as representatives of a class, have the burden of demonstrating that this action may be maintained under Rule 23 of the Federal Rules of Civil Procedure. Such a determination may properly be made only after hearing before the Court.

10. The undersigned are authorized to state that all Defendant schools join in the foregoing Motion.

WHEREFORE, the Defendant schools respectfully pray the Court:

(1) To make a determination that this action may not be maintained as a class action, or

(2) that if the Court upon the face of the Complaint and of this Motion cannot so rule, that it hold a hearing prior to any determination under Rule 23, or

(3) in the alternative, that it dismiss so much of Plaintiffs' Complaint as relates to the representativeness of the Defendant schools and Plaintiffs' claims that the Act is unconstitutional as applied, and proceed forthwith to a determination of the constitutionality of the Act on its face.

BALL & SKELLY,

WILLIAM B. BALL,
Attorney for Defendant Archbishop Wood High School for Girls.

JAMES E. GALLAGHER, JR. AND
C. CLARK HODGSON, JR.,

C. CLARK HODGSON, JR.,
Attorneys for Defendants St. Anthony's Roman Catholic Church School and Ukrainian Catholic School.

ANSWER TO DEFENDANTS' MOTION UNDER RULE 23(c).

(Title Omitted in Printing.)

In answer to the defendant schools' Motion for a ruling that the above action not be maintained as a class action, plaintiff makes the following answer: Plaintiff agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

MOTION OF THE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS TO INTERVENE AS A PARTY DEFENDANT.

(Title Omitted in Printing.)

The Pennsylvania Association of Independent Schools by its Attorneys, Duane, Morris & Heckscher, moves for leave to intervene as a defendant in the above action on the grounds, set forth more fully below:

1. The Pennsylvania Association of Independent Schools (PAIS) is a non-profit corporation organized and existing under the laws of Pennsylvania as an association concerned with matters affecting the interests of its member schools in respect of elementary and secondary education in this Commonwealth. Its membership consists of 94 elementary and secondary schools located throughout the Commonwealth. A list of the member schools is attached as Exhibit "A".

2. All member schools of PAIS are nonpublic schools within the meaning of Section 5603 (paragraph 4) and admit all qualified students without regard to race, creed or color.

3. All member schools of PAIS offer courses in one or more of the following: Mathematics, foreign language, physical science, and physical education. Accordingly, as nonpublic schools, they are entitled under Section 5604 to contract with the Commonwealth through the Nonpublic Elementary and Secondary Education Fund for the purchase of secular educational services in the above mentioned course areas and to receive in payment therefor monies from the Nonpublic Elementary and Secondary Education Fund.

4. The plaintiffs' complaint alleges that the Pennsylvania Nonpublic Elementary and Secondary Education Act is unconstitutional both on its face and as applied and seeks to prevent the payment of any monies to nonpublic schools under the above mentioned act.

5. PAIS, on behalf of its member schools has interests relating to the property which is the subject matter of the above action and is so situated that the disposition of the action may as a practical matter impair or impede the ability of its members to protect those interests unless your petitioners are granted leave to intervene.

6. The member schools of the PAIS have, or may have, defenses to the plaintiffs' claims which present both questions of law and of fact which are common to the above action.

7. Granting the PAIS leave to intervene in the above action will not delay or prejudice the adjudication of the rights of any of the original parties.

DUANE, MORRIS & HECKSCHER,

By:
Henry T. Reath,
Attorneys for Applicant for Intervention, Pennsylvania Association of Independent Schools.

LIST OF SCHOOLS IN THE PENNA. ASSOCIATION OF INDEPENDENT SCHOOLS.

Abington Friends School
Jenkintown, Penna. 19046

Academy of the Assumption
3480 W. School house Lane
Philadelphia, Penna. 19144

Academy of the New Church
Second Street Pike
Bryn Athyn, Pa. 19009

Academy of Notre Dame DeNamur
Sproul and Godfrey Roads
Villanova, Penna. 19085

Agnes Irwin School
Rosemont, Penna. 19010

Akiba Hebrew Academy
223 N. Highland Avenue
Merion, Penna. 19066

The Baldwin School
Bryn Mawr, Penna. 19010

The Booth School
Rosemont, Penna. 19010

The Buckingham Friends School
Lahaska, Penna. 18931

Carson Long Institute
New Bloomfield, Penna. 17068

Cecilian Academy
144 W. Carpenter Lane
Philadelphia, Pa. 19119

Charles E. Ellis School for Girls
Newtown Square, Penna. 19073

Chestnut Hill Academy
Philadelphia, Pa. 19118

Convent School of the Sacred Heart
City Line and Haverford Road
Philadelphia, Penna. 19151

Convent School of the Sacred Heart
Eden Hall, Philadelphia, Pa. 19114

Delaware County Christian School
Malin Road
Newtown Square, Penna. 19073

Divine Word Seminary
East Ridge Road
Girard, Penna. 16417

The Ellis School
6425 Fifth Avenue
Pittsburgh, Pa. 15206

The Episcopal Academy
City Line and Berwick Road
Philadelphia, Pa. 19131

The Erie Day School
1372 W. Sixth Street
Erie, Penna. 16505

Friends Central School
68th and City Line Avenue
Philadelphia, Pa. 19151

Friends Select School
1421 Arch Street
Philadelphia, Pa. 19102

George School
George School, Pa. 18940

Germantown Academy
Fort Washington, Pa. 19034

Germantown Friends School
31 W. Coulter Street
Philadelphia, Pa. 19144

Girard College High School
Girard Avenue at Corinthian Street
Philadelphia, Penna. 19130

Grier School
Tyrone, Pa. 16686

Gwynedd-Mercy Academy
Gwynedd Valley, Pa. 19437

Harrisburg Academy
Box 583, Harrisburg, Pa. 17043

Haverford School
Haverford, Pa. 19041

Haverford Friends School
Buck Lane
Haverford, Pa. 19041

Hill School
Pottstown, Pa. 19464

Kimberton Farm School
Phoenixville, Pa. 19460

Kiskiminetas Springs School
Saltsburg, Penna. 15681

Lancaster Country Day School
Lancaster, Pennsylvania 17603

The Lankenau School
3201 W. School House Lane
Philadelphia, Pa. 19144

La Salle College High School
8605 Cheltenham Avenue
Philadelphia, Penna. 19118

Lansdowne Friends School
Lansdowne, Penna. 19050

Linden Hall
Lititz, Pa. 17543

Malvern Preparatory School
Malvern, Penna. 19355

Mater Misericordiae Academy
Merion Station, Penna. 19066

The Meadowbrook School
Meadowbrook, Pa. 19046

Media Friends School
West Third Street
Media, Pa. 19063

Melrose Academy
Our Lady of Victory Hall
Old York Road
Philadelphia, Pa. 19117

Mercersburg Academy
Mercersburg, Pa. 17236

Mercyhurst Preparatory School
538 E. Grandview Boulevard
Erie, Penna. 16504

Milton Hershey School
Hershey, Penna. 17033

The Miquon School
Harts Lane
Miquon, Penna. 19452

Montgomery Country Day School
Wynnewood, Penna. 19096

Moravian Preparatory School
Bethlehem, Penna. 18018

Moravian Seminary for Girls
Bethlehem, Penna. 18017

Mount Saint Joseph Academy
Flourtown, Penna. 19031

Newtown Friends School
Newtown, Penna. 18940

Oak Lane Day School
Blue Bell, Penna. 19422

Our Lady of Mercy Academy
301 College Park Drive
Monroeville, Pa. 15146

Overbrook School for the Blind
64th and Malvern Streets
Philadelphia, Penna. 19151

Penn Hall Preparatory School
Chambersburg, Penna. 17201

Pennsylvania School for the Deaf
7500 Germantown Avenue
Philadelphia, Penna. 19119

Perkiomen School
Pennsburg, Penna. 18073

Phelps School
Malvern, Pa. 19355

The Rev. Martin Pryke
Executive Vice President
The Academy of the New Church
Bryn Athyn, Pa. 19009

Saint Benedict Academy
330 E. 10th Street
Erie, Penna. 16503

Saint Benedict's Academy
4530 Perrysville Avenue
Pittsburgh, Penna. 15229

Saint Edmund's Academy
5705 Darlington Road
Pittsburgh, Penna. 15217

Saint Francis Academy
1401 Hamilton Road
Pittsburgh, Penna. 15234

Saint John Kanty Preparatory School
3002 E. 38th Street
Erie, Penna. 16501

Saint Joseph's Preparatory School
18th and Thompson Streets
Philadelphia, Penna. 19121

Saint Mary's Academy
5401 Old York Road
Philadelphia, Pa. 19141

Saint Mary's Seminary
E. Division Street
North East, Penna. 16428

Saint Vincent College Preparatory School
Latrobe, Penna. 15650

The School in Rose Valley
Moylan, Penna. 19063

School of the Holy Child
Rosemont, Penna. 19010

School of the Holy Child
Sharon Hill, Penna. 19079

Scranton Preparatory School
Scranton, Penna. 18509

Sewickley Academy
Sewickley, Penna. 15143

Shady Side Academy
423 Fox Chapel Road
Pittsburgh, Pa. 15221

The Shipley School
Bryn Mawr, Penna. 19010

Solebury School
New Hope, Pa. 18938

The Stevens School
Crefeld and Laughlin Streets
Philadelphia, Pa. 19118

The Swain Country Day School
1100 S. 24th Street
Allentown, Pa. 18103

Swarthmore Presbyterian Nursery School
Harvard Avenue
Swarthmore, Pa. 19081

Valley Forge Military Academy
Wayne, Penna. 19087

Valley School of Ligonier
Box 616, Ligonier
Pennsylvania 15658

The Vanguard School
Box 423, Paoli, Pa. 19301

Villa Maria Academy
Malvern, Penna. 19355

Villa Maria Academy
2403 West Lake Road
Erie, Pa. 16505

Westtown School
Westtown, Penna. 19395

The William Penn Charter School
School Lane
Philadelphia, Pa. 19144

The Wyndcroft School
Rosedale Drive
Pottstown, Penna. 19464

York Country Day School
1071 Country Club Road
York, Penna. 17403

Winchester-Thurston School
555 Morewood Avenue
Pittsburgh, Penna. 15213

PRE-TRIAL ORDER.

(Title omitted in printing.)

AND Now, this 20th day of August, 1969, following pre-trial conference held the 18th day of August, 1969, IT IS ORDERED as follows:

1. The motion of the Pennsylvania Association of Independent Schools to intervene as a party defendant is GRANTED for the purpose of argument on defendants' motions to dismiss, without prejudice to said Association's application for more general intervention after disposition of the motions to dismiss.

2. Defendants' motions to dismiss for failure to state a cause of action, for failure to have standing to sue, and defendants' motions to strike a portion of the complaint and for a more definite statement (referred to as Points 7, 8, 10 and 12 in "Plaintiff's Suggested Procedure and Schedule" as submitted at the August 18, 1969 conference), shall be listed for argument at a date to be fixed by the Court after submission of briefs. Briefs for the moving parties shall be filed on or before September 15, 1969, and the answering briefs of plaintiffs shall be filed on or before September 24, 1969. The briefs shall cover, in addition to the motions to dismiss, the question of whether the case is appropriate to be heard by three judges or one judge in the event the motions to dismiss are denied.

3. Discovery:

(a) Objections by defendants to plaintiffs' interrogatories shall be filed within thirty (30) days. In the meantime, defendants shall compile the information for the filing of answers to interrogatories so that answers thereto may be filed promptly after disposition of the motions to dismiss in the event and to the extent that answers thereto shall be directed by the Court.

(b) Vincent J. McCoola shall be deposed at Harrisburg on or before October 1, 1969.

4. In the light of plaintiffs' "Answers to Defendants Motion under Rule 23(c)", IT IS FURTHER ORDERED (a) that the within action shall not be maintained as a class action; and (b) that the last sentence of paragraph 7 of the complaint and similar allegations of like nature contained in the complaint need not be answered by defendants.

BY THE COURT,

WILLIAM H. HASTIE,
William H. Hastie, *Cir. Chief Judge*,
ALFRED L. LUONGO,
Alfred L. Luongo, *J.*,
E. MAC TROUTMAN,
E. Mac Troutman, *J.*,

MOTION TO DISMISS.

(Title Omitted in Printing.)

The Defendants, David H. Kurtzman as Superintendent of Public Instruction of the Commonwealth of Pennsylvania and Grace M. Sloan as State Treasurer of the Commonwealth of Pennsylvania, by their attorneys, respectfully move this Honorable Court to dismiss Plaintiffs' Complaint and to enter judgment for Defendants and assign therefor the following reasons:

1. The Complaint fails to state a cause of action upon which relief can be granted.

2. Act No. 109, the Non-Public Elementary and Secondary Education Act approved by the Governor of Pennsylvania on June 19, 1968, represents a constitutional exercise of the sovereign authority of the Commonwealth of Pennsylvania.

3. The Plaintiffs seeks an adjudication of general unconstitutionality of a statute on the basis of conjectural and speculative consequences possibly resulting from the purchase of educational services from certain named defendants.

4. The general constitutionality of a statute may not be determined on the basis of its anticipated application to a particular case or to a limited class.

5. Plaintiffs' expectation of an unconstitutional interpretation and application of Act No. 109 by officials charged with its administration negates the presumption that state

officials will interpret and apply state statutes in a manne consistent with constitutional directives.

Respectfully submitted,

EDWARD FRIEDMAN,
Edward Friedman,
Counsel General,
WILLIAM C. SENNETT,
William C. Sennett,
Attorney General,
Attorneys for Defendant Kurtzman and Sloan.

AMENDED COMPLAINT.

(Title Omitted in Printing.)

Now come the plaintiffs by their attorney, Henry W. Sawyer, III, and, no responsive pleading having been filed thereto, amend the Complaint in the above-captioned case as follows:

1. By adding, after the second sentence in Paragraph 6, the following:

> On September 20, 1969, Alton J. Lemon went to Liberty Bell Park, a harness racing track, where he purchased a ticket of admission and paid the tax thereon.

2. The word "representative" in the fourth sentence of Paragraph 7 is deleted and the word "typical" is substituted therefor.

HENRY W. SAWYER, III,
Henry W. Sawyer, III,
Attorney for Plaintiffs.

PLAINTIFFS' MEMORANDUM ON THE NECESSITY OF A THREE-JUDGE COURT.

(Title Omitted in Printing.)

The defendants' briefs with respect to both the three-judge court and the meaning of the phrase "as applied" in the complaint purport to believe that, by including seven particular recipient schools as defendants the plaintiffs are suggesting that only in the Act's application to these particular schools (by reason of some peculiar aberration) is the Act unconstitutional as applied. On the other hand, the complaint constantly alleges that these schools are representative (i.e. typical), of the kinds of schools which are receiving the aid provided by Act 109, and yet the defendants move to delete these allegations. So the situation is that the defendants say that "the complaint concerns itself with certain (peculiar) applications of the Act, or, it will as soon as the court strikes from it the allegations which negate our contention."

The complaint attacks a pervasive, state-wide measure, operating in all sixty-seven counties of the state, administered by state-wide officials on a state-wide basis with state-wide effects, financed by state-wide funds. Its allegations doom the statute.

Assuming that the defendants' mien of bemused wonder with respect to the universality of plaintiffs' challenge is in good faith, let us say this: the Act is unconstitutional in every application throughout the sixty-seven counties of Pennsylvania, excepting only the possibility that some non-public school can be produced which (a) is non-church related, and (b) has no ceremonial religious observances and (c) does not discriminate on the basis of race in either admissions or employment. If there were a dozen score of such schools in Pennsylvania, the three-judge court would

still be called for (vs. 1140 non-public schools); if, in fact, there is one it has so far escaped plaintiffs' not totally oblivious notice.

28 U. S. C. § 2281 requires that a three-judge court be convened whenever a complainant seeks to restrain the enforcement, execution, or operation of a state statute upon the ground of unconstitutionality.* The requirement of § 2281 is jurisdictional. It is founded on the legislative policy of precluding the invalidation of important state legislation by a conventional suit in equity brought before a single federal judge. The purpose of the requirement is to safeguard the integrity of state legislation from capricious action by a single judge. *Phillips v. United States,* 312 U. S. 246, 61 S. Ct. 480 (1941).

In *Phillips* Justice Frankfurter succinctly set forth the basic test for determining the applicability of § 2281:

> "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy."

Id. at 251.

The basic determination is whether "state-wide doom" is involved or only illegal executive action which rests on an otherwise constitutional basis. *Id.* at 250.

When the allegations of the complaint in the present case are examined together with the statutory provisions

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* § 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

attacked it is clear that this case is within the mandate of § 2281. The complaint, by direct allegation, attacks the basic constitutionality of a statute which provides for state-wide aid to private schools. That statute is challenged both on its face and as applied as violative of the first and fourteenth amendments. Thus, the entire statutory scheme is claimed to be unconstitutional and is sought to be placed in jeopardy. The fact that particular grants are enumerated in the complaint as instances of unconstitutionality does not narrow the claim that the statute in its entirety is invalid. Certainly it would be a strained misreading of the complaint to in any way construe it as limited to a particular grant to a particular school or class of schools or to anything less than an attack on the entire statutory scheme.

The statute itself provides a comprehensive plan for the appropriation of money on an overall, state-wide basis, to all private educational institutions which may apply. Provision for the "purchase" of "secular education" in "sectarian" institutions and how this is to be accomplished in a "constitutional" manner are the very workings of the Act. And it is this statutory machinery in its entirety which is claimed to be unconstitutional in the present complaint. Obviously, we are not concerned here with the improper exercise of authority in a particular case where the action purports to rest on an otherwise constitutional foundation. In this case the foundation itself, the underlying statute, by which taxpayer funds are sought to be given to sectarian institutions is claimed to be invalid and the "doom" of that foundation on a state-wide basis is the obvious objective of the present case.

Judge Hastie has raised a question regarding the appropriateness of a three-judge court assuming it is conceivable that a particular school could constitutionally receive state aid under the statute. However, the fact that a particular grant may not be unconstitutional is not deter-

minative of the § 2281 issue. That fact bears *on the merits* of the entire controversy. It is not a test to be applied in determining whether *for jurisdictional purposes* a three-judge court is required. The ultimate issue on constitutionality must not be equated with the threshold question of determining proper jurisdiction to hear that issue. For that determination, we need not look beyond the complaint and the statute attacked. If, on this basis it is clear, as it must perforce be in this case, that a substantial claim of constitutional deprivation is raised a three-judge court is required.

The present case is on all fours with *Poindexter v. Louisiana,* 258 F. Supp. 158 (E. D. La. 1966). In that case, plaintiffs attacked the constitutionality of the Louisiana Legislature's attempt to use tuition grants to support so-called "private" schools for white children fleeing from desegregated public schools. On motion to dismiss the defendants contended that the case did not require a three-judge court since the complaint asked the court to enjoin only the constitutional *application* of a tuition grant statute and did not seek to have the statute itself declared unconstitutional. In answer to this contention, Judge Wisdom, on behalf of the three-judge court, in language which is as equally applicable here as it was in that case, stated:

> "The convening of a three-judge court is proper in this case. Section 2281 specifies that this special court is necessary if the plaintiffs seek to restrain the 'enforcement, execution, or operation' of a state 'statute' or an 'order' of a state administrative board or commission. The plaintiffs ask the court to enjoin the defendants and state officers from 'enforcing' the legislative program as administered or as operated under certain Louisiana statutes. A 'petition for injunction on the ground of the unconstitutionality of a statute

> as applied * * * requires a three-judge court.' Here the complaint does not seek to restrain unlawful executive action; here the legislative policy is under attack: 'The crux of the business [use of a three-judge court] is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and is the reconciling principle of the cases.' See *Hall v. St. Helena*, 197 F. Supp. at 658-659 in which a three-judge court enjoined the closing of schools under the earlier statute giving local school boards the authority to suspend or close public schools. See also *Herkness v. Krion*, 1928, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198 in which the Supreme Court rejected the district court's distinction between an allegation of unconstitutional action on the part of state officers as opposed to allegation of the unconstitutionality of the statute under which they acted.
>
> The constitutional contention is substantial. The plaintiffs need not conclusively demonstrate in the complaint the unconstitutionality of the statutes or their application. 'For jurisdictional purposes it suffices that a substantial claim of deprivation has been made.' ''

Id. at 165.

But, it now appears that defendants, in fact, do not dispute that a three-judge court is required. Indeed, as we read their brief they agree that such a court is obviously necessary. What defendants attempt, however, is to transform this *jurisdictional requirement* into some inexplicable limitation on the scope of the evidence which the Court, once properly convened, can consider *on the merits* and that a three-judge court is limited to considering facial unconstitutionality. Dozens of cases refute this, the most recent

in this church-state field being *Schempp*. Thus, by the use of quotations from cases testing whether a three-judge court was not proper where the legality of particular activities unrelated to state-wide legislative action was involved they improperly conclude that once a three-judge court is convened it cannot hear evidence dealing with specific instances of claimed illegality, notwithstanding their bearing on the constitutionality of the entire statutory scheme. This is a non sequitur.

Accepting defendants contention, a three-judge court would always be limited in determining constitutionality to a review of the pleadings. Nothing in § 2281 lends any support to such a contention. Obviously, three-judge jurisdiction cannot be confined to cases where unconstitutionality appears on the face of the statute. See *Poindexter v. Louisiana, supra.* What evidence a court may hear in a particular case is a matter of rules of evidence within the framework of the issues raised and has nothing whatsoever to do with § 2281. To impose the inhibition sought by the defendants in this case would unreasonably restrict the court without in any way implementing the basic policy of § 2281.

Respectfully submitted,

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EXCERPT FROM ORAL ARGUMENT.

(Title omitted in printing.)

[86]

MR. SAWYER: I have a section dealing with that, and, in fact, somewhat expanded with a few additional cases than what I said about it in my brief, and we will be arriving at almost in a moment, your Honor, in the progression of my thoughts here today.

I wanted to review the allegations of the complaint in terms of what are the exact points of unconstitutionality—I just want to label them at this point—that it challenges. First it says—and there are five separate grounds of unconstitutionality, and it is our contention that if we satisfy the Court on any one of them, that the bill goes down. In other words, these are separate, and although they have relationship to one another, if we prevail in the sense of convincing the Court that what we say is indeed true legally and factually, these are all separate grounds.

First, that the bill's purpose is to aid religion.

Secondly, that the bill's primary effect is to aid religion. Not a secular effect, but a religious effect.

Point 3, that the purchase of services is window dressing, that it is a device. And that if it is not a device, that the State is doing something forbidden; i.e.,

[87]

it is attempting to serve a secular end by religious means.

Four, that the Act prefers one religion over another, which legislation may not do.

And five, that it creates the kind of forbidden interdependence between the State and religious organizations, that is unconstitutional.

Now, let me say here that there has been this undercurrent constantly—and it is a perfectly understandable strategy on the part of defendants, to speak as if only facial constitutionality can be considered at this point. There again they misapprehend the motion to dismiss, because I have alleged both facial and applied. And when I say "applied"—constitutionality as applied, I mean it in the sense in which it is I understand generally used, and that is that you look at the general effect of the application of the statute. Constitutionality as applied in the cases is not confined to an application which by some maladministration only affects a particular and specific application.

I am not saying, and I think I have made this clear, that this Act is only unconstitutional as to these defendant schools. I am talking about it being unconstitutional in its entire purpose, thrust and effect in 67 counties of the State of Pennsylvania. I don't want to trench on the three-judge court issue, and that comes close to it. Mr.

[88]

Pfeffer is going to talk about it. But we are not here just talking about facial constitutionality. Nor, I will agree, however, are we here talking about a particular individual quirk which makes it let's say unconstitutional as to one of the defendants. But "applied" is broader than that.

Now, everybody agrees as to what the test is. My brief, and the defendants' brief, all the defendants' brief agrees on what we can label the McGowan-Schempp-Allen test. When does the Court use this test? This test is used by the Court whenever the issue is of the kind that we have here, where the question must be posed: is the primary thrust, purpose, intent, effect of this Act to aid a religious institution with only consequential benefits over to an individual, or is the primary thrust to aid an individual in a legitimate,

let us say, welfare need, in which the effect in behalf of the religious institution is consequential? And the test is that —let's read it, as it is very short. I think it is worth it.

"The test may be stated as follows:—" This is the latest statement of it in Allen. You find it in Schempp, and it was originated in McGowan, with a slight extra flourish which I will speak of. It really originated with Justice Warren in McGowan.

DEFENDANT SCHOOLS' MOTION TO STRIKE REPRESENTATIVE ALLEGATIONS OF THE COMPLAINT AND THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR A HEARING UNDER RULE 23(c).

(Title Omitted in Printing.)

Defendant Schools, by their respective attorneys, respectfully move the Court to enter an Order striking from the Complaint and the Amended Complaint all allegations of "representativeness" or "typicalness"* and direct that the actions proceed as against the seven named Defendant Schools in their individual and not in any other capacities, or, in the alternative, to order a hearing in accordance with Rule 23(c). In support thereof, Defendants assign the following reasons:

1. In paragraph 7 of the Complaint, Plaintiffs averred that the Defendant Schools are representative of all sec-

---

* The allegations of representativeness to which Defendant Schools refer are:

(a) *Complaint,* paragraph 7:

> Each of the institutional defendants is a sectarian educational institution at the elementary or secondary level situated and operating within the Eastern District of Pennsylvania. They are sued herein as representative of all sectarian educational institutions in the Commonwealth of Pennsylvania whose policies and practices, by purpose or effect, exclude from admission or otherwise discriminate against persons by reason of race or religion, the number of such sectarian and other educational institutions being too numerous to be conveniently joined as defendants in this suit.

(b) *Amended Complaint,* wherein the word representative in the fourth sentence of paragraph 7 is deleted and the word "typical" is substituted.

(c) *Complaint,* paragraphs 12, 13, 14 and 15 insofar as they purport to describe activities of the members of the class of which the Defendant Schools are alleged to be representative. See particularly the language "most of the other educational institutions" (paragraphs 13, 14 and 15).

tarian institutions in the Commonwealth and are too numerous to be conveniently joined as Defendants, thereby invoking the class action machinery provided for under Rule 23.

2. Thereafter, on July 25, 1969, Defendant Schools filed a Motion under Rule 23 requesting the Court to hold a hearing for the purposes of determining whether or not the action may be maintained as a class action.

3. At the first pre-trial conference on July 31, 1969, counsel for Plaintiffs stated that the action would not be maintained as a class action. On August 4, 1969, Plaintiffs filed an Answer to Defendants' Rule 23 Motion, stating: "Plaintiff agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure." However, counsel's letter of enclosure, dated August 4th, contained the following statement:

> So that there will be no misunderstanding, the complainants do allege that the defendant schools are representative in certain particulars of all the schools who are the beneficiaries of the Act.

In spite of Plaintiffs' Answer, it was clear that counsel believed that Defendant Schools were representative of all the schools who are beneficiaries under the Act.

4. The contrast between Plaintiffs' Answer to Defendants' Motion, and counsel's covering letter is evident. As a result, Defendant Schools again raised this question at the second pre-trial conference on August 18, 1969.

5. In the course of the discussion at the second pre-trial conference, Defendant Schools understood the Court to say that the pre-trial Order would remove the last sentence from

paragraph 7 of the Complaint. On August 20, 1969, the Court entered a pre-trial Order directing that the action "shall not be maintained as a class action" but that the allegations of representativeness "need not be answered by defendants." Thus, the class action features of this suit remained in the Complaint.

6. Plaintiffs' Memorandum of October 1, 1969 respecting the necessity of a three-judge court made it plain that counsel was still treating the action as a class action, but was trying to avoid the necessity of proving the representativeness of the named schools as required by Rule 23. Note the following language from Plaintiffs' Memorandum:

> The defendants' briefs with respect to both the three-judge court and the meaning of the phrase 'as applied' in the complaint purport to believe that, by including seven particular recipient schools as defendants the plaintiffs are suggesting that only in the Act's application to these particular schools (by reason of some peculiar aberration) is the Act unconstitutional as applied. *On the other hand, the complaint constantly alleges that these schools are representative (i.e. typical), of the kinds of schools which are receiving the aid provided by Act 109, and yet the defendants move to delete these allegations.* (Emphasis supplied. Plaintiffs' Memorandum, page 1.)

7. This memorandum necessitated Defendants again addressing themselves to this issue at oral argument. Plaintiffs' response was to file on October 16, 1969 an Amended Complaint reading in part:

> The word "representative" in the fourth sentence of paragraph 7 is deleted and the word "typical" is substituted.

This language in the light of Plaintiffs' prior acknowledgement that the words "typical" and "representative" are identical, clearly signifies their intention to pursue a class action using synonyms.

8. The terms "typical" or "representative" are not ordinary descriptive adjectives when employed to describe parties sued as part of a larger group at whom a complaint is aimed. The words import the core characteristic of a class action, as to which the subjective intent of the pleader is irrelevant. It is one thing to call a person a "typical scholar", or a piece of music "representative American music": the employment of these adjectives invokes no legal consequences to anyone or to anything. While denying that this is a class action, Plaintiffs' statements and actions demonstrate that they intend the most specific legal consequences to 1100 or more schools not on this record, that is, to subject these schools to judgment in this case without an opportunity to be held under Rule 23.

9. Defendant Schools' view there can be only two alternatives: (a) either this action will proceed as a class action in which Plaintiffs will have to prove that the seven schools are representative of the other beneficiaries under the Act, or (b) the application claims shall be heard only as to these seven named Defendant Schools in their individual capacity and no other capacity. It is obvious that Plaintiffs have attempted to mold a middle ground which will offer the benefits of alleging representativeness with none of the burdens of proving this factual allegation.

WHEREFORE, Defendant Schools respectfully pray the Court to enter an Order striking from the Complaint and the Amended Complaint all allegations of representative-

ness, typicalness and the like, or in the alternative to order a hearing in accordance with Rule 23.

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ATTORNEY GENERAL'S SUPPLEMENTAL MEMORANDUM OF LAW.

(Title omitted in printing.)

The Commonwealth of Pennsylvania pursuant to leave granted by your Honorable Court respectfully submits the following memorandum with respect to the meaning and intent of the Governor's Code of Fair Practices promulgated by the Honorable Raymond P. Shafer, Governor of Pennsylvania on April 25, 1967.

Under the Constitution and laws of Pennsylvania, the supreme executive power of the Commonwealth is vested in the Governor whose duty it is to take care that the laws be faithfully executed.[1]

> "* * * The Governor is designated as the officer having the supreme executive power. He is the highest authority in the executive department, and his power is supreme in the exercise of his judgment or discretion. He bears the same relation to the state as the President does to the United States and, in the discharge of his political duties, is entitled to the same immunities, privileges, and exemptions." 24 Am. Jur. at page 824.

Pursuant thereto, the Governor's Code of Fair Practices was established which inter alia provides:

> "Article VII. Public Contracts
>
> Every State contract for public works or for goods or services shall contain a provision baring discrimination on account of race, color, religious creed, ancestry, age, national origin, or sex and such contractural provisions shall be fully and effectively enforced."

1. Pennsylvania Constitution, Article IV, Section 2; The Administrative Code of April 9, 1929, P. L. 177, Section 701, 71 P. S. 241, et seq.

The said provision has force and effect equal to law in that it is binding upon all departments and agencies of state government under the Governor's jurisdiction subject to the interpretation thereof hereinafter discussed. To that extent the directives thereof become an integral part of every statute and regulation affecting the executive branch of the state government without the necessity for physical incorporation therein.

The statement of executive policy enunciated by Executive Directive No. 21 is consistent with and in furtherance of Commonwealth policy as legislatively expressed in the Human Relations Act of October 27, 1955, P. L. 744, 43 P. S. 951 et seq. and the Fair Educational Opportunities Act of July 19, 1961, P. L. 776, 24 P. S. 5001 et seq. The Human Relations Act condemns the practice or policy of discrimination against individuals or groups *in employment or housing accommodations* by reason of their race, color, religious creed, ancestry, age or national origin. The Fair Educational Opportunities Act declares it to be an unfair educational practice for an educational institution to exclude or limit or otherwise discriminate because of race, religion, color, ancestry or national origin. Significantly, it specifically excludes from the definition of "educational institution" religious or denominational educational institution. It defines such institution to mean:[2]

> "* * * an educational institution which is operated, supervised, controlled or sustained primarily by a religious or denominational organization, or is one which is stated by the parent church body to be and is, in fact, officially related to that church by being represented on the board of the institution, and by providing substantial financial assistance and which has certified,

2. 24 P. S. 5003(2).

in writing, to the commission that it is a religious or denominational educational institution."

Section 2 of the act which declares the policy of the Commonwealth states that:[3]

> "It is recognized that there is a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith. *In such institutions students, otherwise qualified, should have equal opportunity to attend therein without discrimination because of race, color, ancestry or national origin.*

The foregoing policy is reemphasized in Section 4 of the act wherein it is provided:[4]

> "Nothing in this section shall be deemed to affect in any way the right of religious or denominational educational institutions to select its students exclusively or primarily from members of such religion or denomination, or from giving preference in such selection to such members."

Thus the Legislature of Pennsylvania has recognized and emphasized the right of religiously oriented schools to give preference in selection to persons of a particular faith so long as they do not discriminate on account of race, color, ancestry or national origin. This proviso preserves and maintains the state's condemnation of all manner of discrimination while at the same time recognizing that certain educational institutions may give priority to persons of a particular faith seeking admission thereto without being guilty of invidious discrimination.

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3. 24 P. S. 5002(c).

4. 24 P. S. 5004(5-c).

Such invidious discrimination does not result where a policy of a religiously affiliated agency gives preference in admission to persons of the same religion.

Furthermore, the enactment of Act No. 109 of 1968, the statute here under consideration, is obviously designed to aid all non-public schools including those affiliated with a particular religion. This is manifest by its strict requirements that only secular subjects not including any subject matter expressing religious teaching or the morals or forms of worship of any sect shall be purchased under its authority.[5]

> " 'Secular subject' shall mean any course which is presented in the curricula of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms or worship of any sect."

In proclaiming Executive Directive No. 21, Governor Shafer stated that:

> "In the conduct of its affairs, it is incumbent upon State government to be the leader to honor and fulfill the principles and provisions of law which the Legislature has established as the standard policies for the Commonwealth."

The meaning and effect of Article VII of the Governor's Code of Fair Practices can best be determined by reference to the anti-discrimination legislation above discussed. This is a typical case requiring the application of the Rule of Statutory Construction applying to laws in pari materia. That rule which has been incorporated into Pennsylvania's Law of Statutory Construction[6] defines laws as being in

5. Act 109 of 1968, Section 3.

6. Act of May 28, 1937, P. L. 1019, Section 62, 46 P. S. 562.

pari materia when they relate to the same class of persons or things and directs that such laws shall be construed together as one law if possible. It requires that statutes are to be construed in harmony with the existing law and as a part of a general and uniform system of jurisprudence. If such laws can be made to stand together, effect should be given to all their related provisions as far as possible. [In re *Peplinski's Estate*, 155 Pa. Super. 564 (1941) and *Kelly v. City of Philadelphia*, 382 Pa. 459 (1955).] The resolution and statutes under consideration all treat the subject of invidious discrimination. The relationship between them is patently obvious. We must presume that in promulgating the Code of Fair Practices, the Governor intended, as he stated therein, to "honor and fulfill the principles and provisions of law which the Legislature has established."

It is respectfully submitted that the position of the Commonwealth is consistent with the principles established by the Supreme Court of the United States in *Board of Education v. Allen*,[7] *Everson v. Board of Education*,[8] *Rhoades v. Abington Township School District*[9] and *Pierce v. Society of Sisters*.[10]

CONCLUSION.

It is the position of the Commonwealth that the meaning and effect of the Governor's Code of Fair Practices as expressed in Executive Directive No. 21 must be interpreted in the light of existing statutory law and that the directive of Article VII thereof relating to public contracts where educational services are concerned permits the purchase of secular educational services from a religious or denominational educational institution which gives preference in ad-

7. 392 U. S. 236 (1968).
8. 330 U. S. 1 (1947).
9. 424 Pa. 202 (1967), appeal dismissed 389 U. S. 11 (1967).
10. 268 U. S. 510 (1925).

mission policies to persons of the same religion as that to which the institution is affiliated so long as it does not discriminate on account of race, color, age, national origin or ancestry.

Respectfully submitted,

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WILLIAM C. SENNETT,
Attorney General.

A copy of this memorandum is being addressed to the Secretary of Education with the directive that he comply with the conclusions expressed therein. Under the laws of the Commonwealth of Pennsylvania, that opinion is binding upon and must be followed by the Secretary of Education. Administrative Code of 1929, *supra,* 71 P. S. 192; *Commonwealth ex rel. Shockley v. Ross,* 53 Dauph. 329 (1943); *Commonwealth ex rel. Sennett v. Minehart,* 88 Dauph. 279 at 288 (1967).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 69-1206.

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, AND BETH JACOBS SCHOOLS OF PHILADELPHIA

Before WILLIAM H. HASTIE, *Chief Judge, Circuit Court,*
ALFRED L. LUONGO and E. MAC TROUTMAN,
Judges, District Court

OPINION AND ORDER.

TROUTMAN, *J.*

The present suit seeks to enjoin the alleged unconstitutional approval and expenditure of State funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act[1] (hereinafter the Education Act). Since the complaint alleges the unconstitutionality of a statute of state-wide application, this three-judge panel has been convened. 28 U. S. C. §§ 2281-84.[2]

Jurisdiction is based on the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 28 U. S. C. § 1343. Presently before the Court are defendants' motions to dismiss for lack of standing and for failure to state a claim upon which relief can be granted.

The individual plaintiffs are citizens and taxpayers of the Commonwealth of Pennsylvania and their claims are brought in that capacity. Plaintiff Lemon, in addition to being a citizen and taxpayer, is a Negro parent of a child attending public school in Pennsylvania. The organizational plaintiffs are associations of persons resident in the Commonwealth of Pennsylvania which "share as a common objective the separation of Church and State and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion."[3] The National Association for the Advancement of Colored People, (NAACP) with which the plaintiff, Pennsylvania State Conference of the NAACP, is affiliated, "is

1. Nonpublic Elementary and Secondary Education Act, 24 P. S. § 5601 et seq. (Supp. 1969). The complete text of the statute appears in Appendix A, *infra*.

2. See *Ex parte Bransford*, 310 U. S. 354 (1940).

3. Complaint at p. 2.

an organization whose purpose is to seek the elimination of racial discrimination through resort to judicial proceedings and otherwise".[4] Each of the organizational plaintiffs asserts its standing to sue as a party-plaintiff in the instant suit.

The defendant Kurtzman is the Pennsylvania Superintendent of Public Instruction who is responsible for approving the allocation of funds under the Pennsylvania Education Act. Defendant Sloan is the State Treasurer of the Commonwealth of Pennsylvania who will allocate the approved funds. The seven defendant schools are sectarian elementary and secondary educational institutions situated within the Eastern District of Pennsylvania, who have contracted with the Commonwealth for the purchase of secular educational services under the Education Act.[5]

I.

The Nonpublic Elementary and Secondary Education Act.

The Education Act was signed into law by the Governor of Pennsylvania on June 19, 1968. The Act empowers the State Superintendent of Public Instruction to contract for the purchase of "secular educational services" from nonpublic schools located in the Commonwealth of Pennsylvania which fulfill the compulsory school attendance requirements under Pennsylvania law.

In its legislative findings and declaration of policy[6] the Pennsylvania Legislature has determined that a crisis exists in elementary and secondary education in Pennsylvania due to rapid increases in costs and school population

4. Complaint at p. 2.

5. The Pennsylvania Association of Independent Schools (PAIS) has been permitted to intervene as a party-defendant for the limited purpose of arguing the defendants' motion to dismiss.

6. 24 P. S. § 5602, Appendix A, *infra*.

and consequent demands for more teachers and facilities. It was also found that twenty per cent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's compulsory school attendance laws in nonpublic schools. It has been further recognized that elementary and secondary education constitutes a public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose. The Legislature, therefore, conclude that it is a governmental duty to support the achievement of this public welfare purpose by supporting the purely secular objectives of nonpublic education.

Briefly, the operational scheme of the statute permits the Superintendent of Public Instruction to enter into contracts[7] with nonpublic schools, whether sectarian or nonsectarian, for the purchase of "secular educational services". These "secular educational services" are defined[8] to mean "providing of instruction in a secular subject", while secular subject is defined as "any course which is presented by the public schools of the Commonwealth and shall not include any subject-matter expressing religious teaching, or the morals or forms of worship of any sect".

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7. The Pennsylvania Supreme Court has recognized that the State may contract with sectarian institutions for the purchase of needed public services. *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). Furthermore, Pennsylvania has also recognized that such contracts are not "appropriations" to aid such organizations under the Pennsylvania Constitution, Art. III, § 29. *Schade, supra;* see also *Commonwealth v. Perkins*, 342 Pa. 529 (1941). Apparently, the reason for adopting a contractual method for carrying forth the aims of the Education Act was to avoid possible conflicts with the strictures of the Pennsylvania Constitution. Regardless of the method employed to distribute funds under the Education Act, the constitutional result we reach today would not be changed. As long as the purpose and primary effect of the statute neither advances nor inhibits religion, the constitutional standard is satisfied.

8. All definitions appear in 24 P. S. § 5603, Appendix A, *infra*.

All purchases of secular educational services under the Education Act are to be at the "actual cost" of three items of such service: teacher salaries, textbooks and instructional materials. The Education Act further limits all purchases of secular educational services to courses in mathematics, modern foreign languages, physical science, and physical education.[9] As a condition for payment under the Act, the Superintendent of Public Instruction must approve all textbooks and instructional materials employed in the instruction rendered. In addition, a satisfactory level of student performance in standardized tests must have been attained and within five years of the date of the Act all secular educational services for which reimbursement is sought must be rendered by teachers holding State certification equal to the standard for teachers in public schools.[10]

Payment under the Act in discharge of the contractual obligation may be made only after service has been rendered. Section 5607(a) provides in relevant part that:

> Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement. Such account shall be subject to audit by the Auditor General.

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9. The definitions in the "Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act" provide that "Secular educational service purchased under this Act shall consist solely of courses in the subjects of mathematics, modern foreign languages, physical science, and physical education". Definition 8 at p. 3.

10. See 24 P. S. § 5604, Appendix A, *infra*.

Funds for the operation and administration of the Education Act are to be drawn only from the nonpublic elementary and secondary education fund. The monies comprising this fund are to be taken exclusively from the proceeds of State horse racing and harness racing.[11]

Defendants, in their brief, have informed the Court that 1181 nonpublic elementary and secondary schools in Pennsylvania, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties, are now under contract with the Commonwealth pursuant to the Education Act. One year's performance under contract has now been rendered and, on September 2, 1969, the Commonwealth paid its first quarterly installment obligation.

II.

Standing of the Individual and Organizational Plaintiffs.

The defendants have moved pursuant to Rule 12(b) to dismiss plaintiffs' complaint on the grounds that both the organizational and individual plaintiffs lack standing to maintain the instant suit under the religious clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment.[12]

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11. Section 5606 of the Act prohibits the use of any monies raised by the Commonwealth for the support of the public schools to pay for services or administrative costs under the Education Act. In December, 1968, extensive regulations were promulgated by the Superintendent of Public Instruction which further delineate the details and operating procedures of the Act and further elaborate its secular, fiscal, and quality controls.

12. For the purposes of standing, we consider plaintiffs allegations under the Civil Rights Act, 42 U. S. C. § 1343, to be substantial—equivalents to the equal protection claims raised. We have made, therefore, no separate analysis of standing under the Civil Rights Act, but rather treat these contentions in our analysis of standing under the equal protection clause.

A. Organizational Plaintiffs.

The organizational plaintiffs assert their standing solely on the ground that they are organizations established for the purposes of either maintaining the separation of Church and State or preventing racial discrimination. Nothing further is alleged with respect to the issues of the instant case than the fact that these organizations share a common interest in the outcome of this suit as it may or may not comport with their particular organizational goals. The fundamental aspect of standing, as recently articulated by the Supreme Court, is that "it focuses on the party seeking to get his complaint before a federal court . . ." *Flast v. Cohen,* 382 U. S. 83, 99 (1967). The *Flast* decision further noted that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a *personal stake* in the outcome of the controversy' . . . and whether the dispute touches upon '*the legal relations of parties having adverse legal interests.* . . .'" *Flast v. Cohen, supra,* at 101 (Emphasis added).

On the basis of the allegations set forth in the complaint as they pertain to the organizational plaintiffs, we can perceive of no *personal stake* or *adverse legal interests* of these plaintiffs which demonstrate their standing as *parties* to the instant suit. Regardless of the good motives of these organizations, the mere fact that the instant case may result in a decision which may be in accord with or adverse to the respective general purposes of these organizations we believe is insufficient to establish standing to sue as an affected party in interest.[13] Consequently, the organiza-

13. The organizational plaintiffs have argued that they should be permitted to sue here as private attorneys general. The Court, however, perceives no precedent or persuasive reason to adopt this theory in the instant case. Indeed, to do so may result in the rendering of an advisory opinion on a constitutional matter in contravention of Article III of the Constitution. See *Muskrat v. United States,* 219 U. S. 346 (1911).

tional plaintiffs have failed to establish standing as to both the religious and equal protection issues involved in the instant case.

B. Individual Plaintiffs.

The individual plaintiffs, Alton Lemon, Priscilla Reardon and Betty J. Worrell, assert standing under the religious clauses of the First Amendment and the equal protection clause based upon varied allegations of status as to each issue.

Initially, it is alleged that all individual plaintiffs are taxpayers of the Commonwealth of Pennsylvania. Plaintiff Lemon alleges he has paid an admission fee to a Pennsylvania race track. Such fees provide the sole financing of the Education Act. The other individual plaintiffs have not alleged payment of such admission fees.

As to plaintiff Lemon's standing as a taxpayer under the establishment and free exercise clauses of the First Amendment, again we note that the focus is on the party asserting his claim. In this respect, however, "[i]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen, supra,* at 103. Although the *Flast* decision concerned itself with the status of a federal taxpayer to challenge a federal spending program under the establishment and free exercise clauses of the First Amendment, we consider that its requirements as to standing apply as well to state taxpayers. *Flast* dictates two requirements for taxpayers standing, namely that: "First the taxpayer must establish a logical nexus between that status and the type of legislative enactment attacked" 392 U. S. at 102, and "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged". 392 U. S. at 102. In *Flast,*

both elements were satisfied since it was alleged that the taxing and spending powers of the federal government were being used in excess of the specific constitutional limitations imposed upon their exercise by the First Amendment. See 392 U. S. at 103. Since the First Amendment applies to State governmental powers, *Cantwell v. Connecticut*, 310 U. S. 296 (1940), the exercise of State taxing and spending is equally limited. These are precisely the allegations made by plaintiff Lemon in the instant case. We, therefore, hold that he has by these allegations demonstrated standing to challenge the Education Act under the establishment and free exercise clauses of the First Amendment.

The other individual plaintiffs assert generally that they are taxpayers in Pennsylvania. However, they have not alleged the payment of any tax which would bring them within the class of affected taxpayers. *Doremus v. Board of Education*, 342 U. S. 429 (1952); *Murdock v. Pennsylvania*, 319 U. S. 108 (1943). Rather, these plaintiffs allege that they have not paid an admission fee to a Pennsylvania race track because to do so would require them to pay tax for the support of religion in violation of their rights of conscience. The personal right to freedom of conscience is protected by the free exercise clause of the First Amendment and the State may not condition other rights or privileges upon the sacrifice of this freedom. See *Sherbert v. Verner*, 374 U. S. 398 (1963); *Torcaso v. Watkins*, 367 U. S. 398 (1961). Although the privilege to attend a race track here asserted and its connection to free exercise is less apparent than in either of the above cited cases, we will recognize it for the purpose of establishing the standing of these plaintiffs.

The remaining question is whether any of the individual plaintiffs have standing to challenge the Education Act on equal protection grounds. It is alleged generally in the complaint that the private schools which have contracted or will contract with the Commonwealth under the Education Act

intentionally discriminate in the selection of students and/or teachers or are de facto segregated by race or religion. It is further alleged that the funds allocated by the Commonwealth to these schools under the Act will be used to perpetuate and support these practices and as such there is State action involved. We will assume for the purpose of deciding this aspect of the standing issue that these alleged facts could be proved at a hearing on the merits. Nevertheless, these plaintiffs lack standing to challenge the Education Act under the equal protection clause of the Fourteenth Amendment.

The Education Act on its face does not use religion or race as a standard or guideline to determine who may enter into a contract with the Commonwealth. As such the Act itself does not purport to make any classifications to deny equal treatment to members of any particular race or religion. As we previously noted, the requirement of standing focuses on the party affected and his personal stake in the outcome of the litigation at issue. Plaintiff Lemon asserts his status as a Negro and parent of a child in a public school in Pennsylvania. However, there is no allegation in the complaint which asserts that Lemon or his child is personally affected by any alleged intentional discrimination or de facto segregation in these schools. There is no allegation that Lemon's child attempted to enroll at any of these schools and was denied admission because of race or religion. None of the other plaintiffs' allegations point to any interest, parental or otherwise, which has been or may be affected by the alleged discriminatory practices. The absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical grievances of others who *may be* personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected. *Flast*, supra, at 110. See also *United Public Workers v. Mitchell*, 330 U. S. 75 (1947).

Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws where he himself was not the object of such practice.[14] Consequently, as none of the individual plaintiffs have alleged a personal stake in the instant case, they have failed to establish standing under the equal protection clause.

III.

Establishment and Free Exercise.

We consider now the defendants' motions to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted. In this posture of the case we accept as true all well-pleaded allegations of fact in the plaintiffs' complaint. The plaintiffs allege as a fact that the purpose and primary effect of the Education Act is to aid religion. For the purpose of considering the motion to dismiss it is argued that the allegation of the purpose and primary effect of the Education Act in the complaint must be deemed admitted. While it is true that well-pleaded facts in the complaint are deemed admitted for the purpose of testing its sufficiency, such an admission does not include legal conclusions drawn from these facts. *Newport News Co. v. Schauffler*, 303 U. S. 54, 57 (1937); *Pauling v. McElroy*, 278 F. 2d 252, 253-254 (D. C. Cir. 1960). We believe that the allegation asserts not a fact but a conclusion of law and as such is not admitted for purposes of testing the sufficiency of the complaint. The question of law then presented is whether the purpose or primary effect of the Pennsylvania

14. *See e.g. Burton v. Wilmington Parking Authority*, 365 U. S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F. 2d 959 (4th Cir. 1963) *cert. denied* 376 U. S. 938 (1964); *Deal v. Cincinnati Board of Ed.*, 369 F. 2d 55 (6th Cir.) *cert. denied* 389 U. S. 847 (1966).

Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion.[15]

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This limitation originally placing a restriction only on federal governmental involvement in religion has since been judicially incorporated into the Fourteenth Amendment and now represents a bar on State as well as Federal action. *Cantwell v. Connecticut*, 310 U. S. 296 (1940). The meaning and scope of the First Amendment have been elaborated several times by the decisions of the United States Supreme Court in areas involving education. Most apposite to the instant case are the Supreme Court's decisions in *Everson v. Board of Education*, 330 U. S. 1 (1947) and *Board of Education v. Allen*, 392 U. S. 336 (1968). In *Everson*, the Supreme Court held that a New Jersey statute which authorized State reimbursement to parents for bus fares of children attending both public and parochial schools did not violate the establishment clause of the First Amendment. The Court noted that the establishment clause prohibits the states from setting up a church or supporting the religious activities of sectarian institutions. 330 U. S. at 16. However, the Court further observed that a State may not hamper citizens from receiving the benefits of public welfare legislation by excluding religions from its benefits. *Id.* The First Amendment "requires the State to be neutral in its relations with groups of religious believers and nonbelievers. . . ." 330 U. S. at 18. As bussing was generally in the same category as other government services provided

15. More specifically, with respect to the establishment clause, in paragraph 18 of the complaint it is alleged that the Act (1) "has as its purpose the advancement of religion", and (2) "finances and participates in the blending of sectarian and secular education", (3) "provides for direct financial aid out of State funds to sectarian schools", and (4) "has as its primary effect the advancement of religion".

to parochial schools such as ordinary police and fire protection, sewage disposal, public highways and sidewalks, this measure of aid, as it benefited school children, could be constitutionally extended without breaching the standard of government neutrality toward religion embodied in the First Amendment.

Most recently, in *Board of Education v. Allen*, 392 U. S. 236 (1968) the Court sustained, over First Amendment objections, legislation in New York which required the State to lend textbooks free of charge to all children in private sectarian and nonsectarian school. The Court recognized that "*Everson* and later cases have shown that the line between State neutrality to religion and State support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree'. Zorach v. Clauson, 343 U. S. 306, 314 (1952). See McGowan v. Maryland, 366 U. S. 420 (1961)". *Id.* The Court re-examined its prior decisions and articulated a pragmatic standard, first espoused in *Abington School District v. Schempp*, 374 U. S. 203 (1963), by which to test legislation designed to achieve a public objective through religiously affiliated educational institutions. To distinguish between "forbidden involvement of the State with religion and those contacts which the Establishment Clause permits" the Supreme Court stated:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U. S. at 222.

Although the results of the *Everson* and *Allen* decisions were to provide some measure of indirect aid to parochial schools in that transportation to receive religious instruction was facilitated and that the parochial schools' funds were no longer required to purchase certain books, such results did not constitute a breach of State neutrality towards religion. In applying the purpose and primary effect test to the New York statute in *Allen*, the Supreme Court reasoned that "[t]he express purpose of section 701 was stated by the New York legislature to be furtherance of the educational opportunities avaliable to the young. . . . The law merely makes avaliable to all children the benefits of a general program to lend school books free of charge." 392 U. S. at 243. Although a distinction between bussing and books was recognized, since the latter may be used as a vehicle of religious teaching, the Court noted that the language of the New York statute neither authorized nor permitted loans or distributions of religious literature. Properly, the Court was not willing to assume that New York's administrators would violate the terms of the statute; accordingly, it was held that the principal of neutrality was satisfied and the primary effect of the statute was not to advance religion. See 392 U. S. at 244, 245.

It is here argued that Pennsylvania's Education Act has as its purpose and primary effect the advancement of religion. We believe that the purpose of the Education Act can be found clearly on its face. The Legislature has declared that the purpose of the Education Act is "to promote the welfare of the people of the Commonwealth of Pennsylvania" and to "promote the secular education of children attending nonpublic schools". Support for this declaration of purpose is found in specific legislative findings which point to the percentage of school-age children educated in Pennsylvania's private institutions, the

rising cost of education, increased school population and demands for more qualified teachers and adequate facilities. Furthermore, the Legislature also recognized the potential financial burden on the public treasury and long-range impairment of education which may result if private institutions no longer bear their present educational burdens. The plaintiffs argue that because the vast majority of schools which will contract for the purchase of secular educational services under the Education Act are sectarian schools, the purpose or operative effect of the instant statute must be to support religion. We cannot accept the plaintiffs' argument. "The fact that a State law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a Legislature has erroneously appraised the public need." *Everson v. Board of Education,* 330 U. S. at 6. The purpose of the statute on its face indicates that "[the State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded". 392 U. S. 247. The plaintiffs urge that we re-examine the legislative history of the statute and contend that such an examination will disclose that the true intent of the Pennsylvania legislators was to aid religion. We do not, however, feel that it is necessary or appropriate in the instant case to re-examine the legislative history of the Education Act in search of the "true intent" of Pennsylvania's legislators. The legislative findings of the State are not to be lightly set aside. In this connection, Mr. Justice Frankfurter has observed that:

> [T]he private and unformulated influences which may work upon legislation are not open to judicial probing. "The decisions of this Court from the beginning lend no support whatever to the assumption that the judi-

> ciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." McCray v. United States, 195 U. S. 27, 56. "Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." (Citations omitted) *McGowan v. Maryland,* 366 U. S. at 496.

The education of our nation's children quite properly has been recognized by the Supreme Court as a proper subject of legislation enacted in furtherance of a public interest. *Cochran v. Board of Education,* 281 U. S. 370 (1930). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning; rather, educational goals may effectively be satisfied through private education. *Pierce v. Society of Sisters,* 268 U. S. 510 (1925). As a sensible corollary to the *Pierce* decision and considering the State's interest in satisfying its compusory education laws through private educational institutions, the *Allen* Court observed:

> [I]f the State must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular educational function. 392 U. S. at 236.

We recognize that "private education . . . is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," 392 U. S. at 247, and that the public's reliance on private education suggests that adequate *secular* education is being provided in these schools. We further recognize, as did the Supreme Court in *Allen,* that the "State's interest in education may

be sufficiently served by reliance *on the secular teachings which accompany religious training*'' in nonpublic schools. 392 U. S. at 245. Furthermore, we consider that ''religious schools pursue two goals, religious instruction and secular education'', 392 U. S. at 245, and we believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the *strictly secular* function of educating Pennsylvania's school children in the secular subjects of mathematics,[16] physical sciences,[17] modern foreign language,[18] and physical education.[19] That the Commonwealth

16. In the Regulation to the Education Act mathematics is defined as follows:

> 12. "Mathematics" shall mean the science of numbers and their operations, interrelations, combinations, generalizations, and abstractions, and of space configurations and their structure, measurement, transformations, and generalizations. It includes the study of number, space, and structural patterns. Branches of mathematics include arithmetic, algebra, geometry, trigonometry, calculus, analysis, probability, statistics, logic, and number theory.

17. Physical Science is defined as

> 15. "Physical science" is organized knowledge about the physical composition and structure of phenomena and the process of relating quantitative or qualitative description of physical phenomena related to time, space, mass, or derived concepts in a manner that is in agreement with all observed properties of these phenomena. "Physical science" includes the basic sciences of chemistry, physics, astronomy, geology, physical oceanography, and meteorology as well as the areas of specialization derived from these.

18. Modern foreign language does not include the teaching of traditional church related classic languages such as Latin or Greek.

> 13. "Modern Foreign languages" is a term collectively applied to the study of pronunciation, grammar, composition

must not be involved in the religious functions of sectarian educational institutions is clearly established by the nature and kind of strictly secular subjects selected in the statute itself and the controls and restrictions placed upon the statute's operation by the regulations promulgated thereunder. Thus limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect. Moreover, the statute applies to *all* nonpublic schools both sectarian and non-sectarian. As it may apply to sectarian institutions, we concur with the Supreme Court's statement in Allen, supra, that "*we cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." (Emphasis added) 392 U. S. at 248.

Administered within its narrow confines neither the primary nor the necessary operative effect of the statute advances religion. It is quite unlike the situation where State tax-supported public school buildings, facilities and teachers are used as a forum and means for the dissemina-

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and reading of foreign languages in contemporary use, as contrasted with that of the ancient, or "dead", languages commonly called the classics.

19.

14. "Physical education" refers to that part of the school programs which provides guidance and instruction through physical activities designed to meet the needs of pupils in developing their physical efficiency and recreational skills, and, along with other phases of the curriculum, provides maximum opportunity for growth physically, mentally, emotionally, and socially. It includes adaptive physical education for those pupils who, because of health reasons, are unable to participate in regular classes. "Physical education" does not consist of instruction in music, driver education, military training, or extramural or interscholastic athletic and/or sports. Health instruction is not considered physical education.

Physical education does not include sex education or other areas which may be deemed religiously oriented.

tion of religious doctrines at times and on occasions when pupils are subject to the State's compulsory attendance laws. *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Abington School District v. Schempp*, 374 U. S. 203 (1963); *Engel v. Vitale*, 370 U. S. 421 (1962). On the contrary, the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost. Unlike *Schempp* and *Engel* the statute here maintains a position of complete *religious* neutrality. In *Zorach v. Clauson*, 343 U. S. 306, the Court approved the State's encouragement of "religious instruction" and its cooperation "with religious authorities."[20] Here the Education Act does not go so far as to encourage the teaching of religious matter. We recognize that the separation of Church and State embodied in the non-establishment principle is not a self-defining concept. The increasing national concern for education in our society, coupled with the public awareness that private schools are performing a significant public service in educating great numbers of school-age children, necessarily makes the State interested in private education. Of necessity therefore:

> As the State's interest in the individual becomes more comprehensive, it's concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Most aim at human good, and in their respective views of what is good for

20. The Court in *Zorach* stated:

> When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . 343 U. S. at 313.

> many they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay. McGowan v. Maryland, 366 U. S. 420, 462 (1966). (Separate opinion of Mr. Justice Frankfurter).

That such a common interest in education exists is desirable if not essential to the continued existence of a free society so long as the State's function is, as here, carefully defined, limited and confined to secular as opposed to sectarian matters. We do not view the First Amendment as requiring an absolute separation between necessarily overlapping interests in the secular education of school-age children. To require such a standard would assume that the State and religion exist in mutually exclusive and sharply defined spheres having no common natural interest in the education of our youth. Such a view would not comport with the extension of even police or fire protection or other governmental services in the public interest.

Nor do we find persuasive the argument that the child must be the direct beneficiary of government funds which support secular education. Such an approach would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities. The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers. In our view the constitutional result should not and cannot wholly depend upon the identity of the payee. The use to which the funds are put must be the primary concern.[21]

The mandate of the First Amendment is neutrality with respect to religious teachings, beliefs and practices.

21. The Supreme Court in *Allen* implicitly recognized this when it noted the secular books on loan under New York's statute were ordered and stored by the parochial schools but were furnished for the *use of individual students*. As such this secular use was in conformity with the Constitution. 392 U. S. at 244 n. 6.

The Education Act does not employ religion as its standard. The prerequisites to receiving government funds for the purchase of secular educational services, we believe, are designed to maintain the neutrality required by the First Amendment. While it may be argued that the consequential result of the instant statute may be to indirectly benefit non-public sectarian schools, the purpose and primary effect of the Education Act is secular in nature and such an incidental benefit is not sufficient to infringe upon the non-establishment principle of the First Amendment. As was noted by Mr. Justice Harlan, concurring in *Board of Education v. Allen,* supra:

> [W]here the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State, 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom . . . it is not forbidden by the religious clauses of the First Amendment. 392 U. S. at 249.

Admittedly, the line is not an easy one to draw. However, we believe the Education Act is consistent with neutrality towards religion and comes within the permissible limits and spirit of the non-establishment principle. Consequently, we will dismiss the plaintiffs' complaint under the establishment clause.

Plaintiffs also allege in their complaint that the Education Act on its face and in its necessary operative effect denies them the free exercise of religion. With respect to each of the plaintiffs, it is alleged that "[i]t is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools." It is also alleged that the Act "constitutes com-

pulsory taxation for the support of religion or religious educational institutions."

With respect to the latter allegation, as we have decided that the Education Act in purpose and primary effect does not advance or support religion, such taxation, assuming arguendo that it is compulsory, is not for the support of religion. Consequently, this allegation must fall. With respect to the former allegation, it is the purpose of the free exercise clause of the First Amendment "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority". *School District of Abington Township v. Schempp,* 374 U. S. 203, 223 (1963). There is no allegation in the plaintiffs' complaint as to what their particular religious beliefs are nor how the Education Act, by authorizing the purchase of secular educational services, coerces them in the practice of their religion. In dismissing the free-exercise allegation in *Board of Education v. Allen, supra,* the Supreme Court stated:

> Appellants also contend that '§ 701 offends the Free Exercise Clause of the First Amendment. However, it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion' Abington School District v. Schempp, 374 U. S. 203, 223 . . . and appellants have not contended that the law in any way coerces them as individuals in the practice of their religion. 392 U. S. at 248.

Since these essential allegations are also lacking in this case plaintiffs have failed to state a claim under the free-exercise of the First Amendment and, therefore, their complaint will be dismissed. In view of our disposition of defendants' motions to dismiss, we need not consider the remaining motions.

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

ORDER.

AND NOW, this 28th day of November, 1969, IT IS ORDERED that:

1. Defendants' motion to dismiss the complaint as to the organizational plaintiffs for lack of standing on all issues raised herein is GRANTED.

2. Defendants' motion to dismiss the complaint as to plaintiff Lemon for lack of standing under the religious clauses of the First Amendment is DENIED.

3. Defendants' motion to dismiss the complaint as to the remaining individual plaintiffs, Priscilla Reardon and Betty J. Worrell, for lack of standing as taxpayers under the establishment is GRANTED.

4. Defendants' motion to dismiss the complaint as to individual plaintiffs Reardon and Worrell for lack of standing under the free-exercise clause is DENIED.

5. Defendants' motion to dismiss the complaint as to all individual plaintiffs for lack of standing under the equal protection clause is GRANTED.

6. Defendants' motion to dismiss the complaint for failure of all plaintiffs to state a claim upon which relief can be granted is GRANTED.

By THE COURT,

ALFRED L. LUONGO, *J.*
E. MAC TROUTMAN, *J.*

APPENDIX A TO OPINION AND ORDER.

[See Appendix "A" to Complaint, pp. A18 to A25, *supra.*]

HASTIE, *Chief Circuit Judge,* dissenting.

The basic question we have to decide is whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, No. 109 of June 19, 1968, 24 P. S. § 5601, on its face and construed in the light of certain factual allegations of the present complaint which must be deemed correct on motion to dismiss the complaint, violates the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment.

The Act provides that the state shall pay public funds to applying "nonpublic" elementary and secondary schools to reimburse them for having rendered "secular educational service" through the teaching of certain subjects; namely, mathematics, modern foreign languages, physical science and physical education. Reimbursement to a school is authorized only for the cost of teachers' salaries, textbooks and instructional materials after and to the extent that such costs have actually been incurred by the institution.

The complaint alleges that the great majority of the schools eligible for subsidies under the Act are affiliated with or under the control or direction of churches or are in other respects sectarian schools or schools which teach religion and that the primary purpose as well as the principal effect of the Act is thus to aid religious institutions. For purposes of the present motion the majority opinion properly accepts as factually correct the complaint's allegations as to the religious and sectarian character of most of the schools intended to receive and actually receiving state grants in aid under the Act. However, that opinion characterizes as an allegation of law, and therefore refuse to accept as correct, the allegation that the primary purpose and principal effect of the Act is thus to aid institutions of religion. Instead, the majority seems to view the question of the purpose and effect of the statute as foreclosed by declarations in the statute itself that the legislative purpose

is "to promote the welfare of the people of the Commonwealth" and "to promote the secular education of children attending nonpublic schools". With this I cannot agree.[1] But even if inquiry as to purpose and effect should be confined to examination of the language and scheme of the statute, I cannot avoid the conclusion that the primary purpose and effect of the enactment is to help the nonpublic schools by supplying them with needed financial aid, while whatever promotion of the public welfare is anticipated as a result of such public assistance is at best an incidental consequence claimed in justification of the state's action.

It merits mention at this point that both the statutory text and the majority opinion make much of the concept that the state "contracts to purchase secular educational services". Actually, this phrase is not descriptive of the statutory scheme. A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called "contract". The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure in asking for aid and later proving that it has made expenditures that are reimbursable under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none. The artificial characterization of this

1. This is not a disposition on summary judgment where the factual posture of the case is established by affidavits and exhibits. Here decision is controlled by the allegations of the complaint and our judgment as to the potentiality of proof thereunder.

rocedure as "contracting for secular educational services" oes not help solve our constitutional problem.

Certainly the Establishment Clause of the First Amendent does not preclude the state from providing any assistance, no matter how indirect, to religious institutions. s the majority opinion correctly indicates, religion's interest and the state's interest in the public good necessarily verlap. In contemporary experience churches and other eligious institutions characteristically, and to their great redit, conceive their mission and undertake their ministry hrough various social means additional to the fundament f worship. The providing of shelter and care for the needy nd aged, education for youth, and other social services for he community are all deemed an important part of organzed church work. Yet, in the modern welfare state, similar ctivities have long since won recognition as important overnmental functions and responsibilities, from the performance and discharge of which religious institutions with ike undertakings may derive incidental benefits. Thus, where the state has supplied all school children with transportation and books, sectarian educational enterprises are ndirectly aided by being relieved of a financial burden which they might otherwise feel obligated to bear. In *Everson v. Board of Education*, 1947, 330 U. S. 1, and *Board of Education v. Allen*, 1968, 392 U. S. 236, the Supreme Court recognized that the Constitution does not preclude a state from thus providing public services directly to its people merely because such services incidently aid religious institutions. However, these cases do not suggest that the Constitution permits direct public financing of a religious enterprise merely because such aid also benefits the state.

It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sec-

tarian schools formulate and offer a comprehensive curriculum apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses a sectarian school for any part of the curricular costs of such a teaching program it directly finances and supports a religious enterprise. Constitutionally, such subsidizing of a religious enterprise is not essentially different from a payment of public funds into the treasury of a church. Such a prohibited involvement of the state in a religious undertaking is not validated merely because the religious enterprise itself incidentally relieves the state of the cost of educating many children.

Even more important than the foregoing analytical distinction are the constitutionally significant consequential distinctions between the present statute and those considered in the *Everson* and *Allen cases*. The statute in this case, much more than those in *Everson* and *Allen*, invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions.

It has already been pointed out that sectarian schools are only part of the complex of activities, many of them as "secular" as the teaching of languages and physical science, which modern churches and religious institutions finance and conduct. Charities, hospitals, community centers and homes for the aged and infirm are familiar examples. The theory that would validate Act No. 109 also unavoidably

validates state subsidies for all such enterprises of religious organizations, as well as subsidies for all of the "secular" parts of sectarian education not included in the present statute. If the Constitutional bar to state grants in all such cases should be removed, it is reasonable to anticipate continuing political controversy in every state and local community whether and to what extent public funds are to be granted to subsidize a large number and a broad range of activities of religious organizations. Leaders and devout members of various organized religious groups will see it as their duty to their church or sect to seek such aid and to insist that state and local government contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith. In this way religion and politics will become *in pari materia.*

So far we have escaped much of the divisiveness and antagonism of political differences and controversies about religious matters because public financing of activities of religious organizations has been understood to be prohibited by our Constitution. Professor Paul Freund has perceptively pointed out that President Kennedy was able to avoid taking a political position upon issues of religious character by relying upon authoritative decisions on the Constitutional separation of state and religion as controlling. Freund, *Public Aid to Parochial Schools*, 1969, 82 HARV. L. REV. 1680, 1692. But if the present statute is held to be Constitutional, I see no escape from the evils that attend a widespread and pervasive intermingling of politics and religion.

The other side of the coin is the inevitablity of state intrusion into the affairs of organized religion in the administration of the present statute. As already stated, it is

the justifying imperative of most, if not all, church sponsored and controlled education that formal education shall serve to inculcate and reinforce in youthful minds sectarian doctrine and moral precepts derived from the tenets of the church.[2] In schools with such a mission it is appropriate, practically unavoidable, that admission policies and practices reflect a preferance for enrollment of children of the sponsoring faith, though not necessarily excluding all others. Yet, once the state joins in financing such education, the mandated equalitarian position of the state must result in state imposition of strictly non-discriminatory admission standards consistent with public duty,[3] whatever sacrifice of appropriate religious objectives may result. I cannot square such state intrusion into religious affairs with the concept of separation of church and state which the First Amendment implements.

The same is true in the matter of curriculum. If the state is to finance "secular" teaching in parochial and other church related schools, the state must have the power and responsibility of monitoring curriculum and instruction to assure that teaching in these state supported areas is not so oriented as to inculcate sectarian or religious tenets or doctrines. Indeed, Act No. 109 expressly provides for

2. See L. Pfeffer, Church, State, and Freedom, 1953, 290-300; See also Rev. S. Woywood, The New Canon Law, under imprimatur of Most Rev. Francis Spellman, Archbishop of New York, and others (1940), quoted in *Everson v. Board of Education*, 330 U. S. 1, 18, 22-23 (Jackson, J., dissenting).

3. *Cf. Evans v. Newton*, 1966, 382 U. S. 296; *Burton v. Wilmington Parking Authority*, 1961, 365 U. S. 715; *Cooper v. Aaron*, 1958, 358 U. S. 1, 16-19; *Pennsylvania v. Board of Directors of City Trusts*, 1957, 353 U. S. 230; *Kerr v. Enoch Pratt Free Library*, 4th Cir. 1945, 149 F. 2d 212.

It is difficult to see how the provision of the Pennsylvania Fair Educational Opportunities Act that sanctions religious discrimination in admission policies and practices of sectarian schools could validly be applied to sectarian schools that receive public financing under Act No. 109. 24 P. S. § 5004(c).

state approval of text books and teaching materials in all subsidized schools. The substantiality of this involvement is indicated by Mr. Justice Douglas in the course of his dissent in *Board of Education v. Allen,* 392 U. S. 236, 258-62, where he elaborates numbers of instructive examples of sectarian orientation in teaching materials appropriately used in the teaching of "secular" subjects in church related schools. The extent to which religious orientation of secular subjects will become an appropriate subject of state inquiry is also suggested by interrogatories which the plaintiffs in this suit have addressed to the defendant schools. For example, the church related schools have been asked to disclose the extent to which sectarian precepts are involved in the teaching of secular subjects; whether teachers of such subjects are clerics, and what religious materials and symbols are used or displayed in the schools in connection with activities other than religious ceremonies. It is difficult to imagine a type of intrusion by the state more offensive to a religious community than such pervasive monitoring and investigation of instruction and academic organization in order to purge the secular areas of the curriculum of religious orientation. Yet, it is to just such intrusion that the Pennsylvania statute opens the door, if by necessary implication it does not go farther and mandate the entry of state overseers as the only means by which the state can adequately check upon the initial and continuing eligibility of particular "secular" instruction for state financing.[4]

Mr. Justice Goldberg, in *Abington v. Schemp,* 1963, 374 U. S. 203, 248 and Mr. Justice Harlan, in *Board of Education v. Allen,* 392 U. S. 236, 249, have both expressed what I believe to be a sound rationalization that the First Amend-

4. Act No. 109 explicitly restricts state aid to courses which "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect".

ment is violated by state action which will "involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude". I am unable to avoid the conclusion that the state undertaking authorized by Act No. 109 would thus intolerably involve the state in the realm of the sectarian.

It must also be considered that some of the schools eligible for aid under Act No. 109 appear to be non-sectarian private schools which do not include religious training in their educational programs. Obviously, the First Amendment does not debar state aid to such schools. However, the plaintiffs allege and seek to prove statistically that only a very small minority of the eligible schools are of this character and that this fact and the legislative history of the statute combine to show that the primary purpose and effect of the legislation is to aid sectarian schools. I think the plaintiffs should be permitted to show, if they can, that the inclusion of non-sectarian private schools as institutions eligible for state aid is so minor and incidental an aspect of the statutory scheme that it cannot validate the enactment.

It remains to consider the claim that subsidizing the defendant non public schools as authorized by the statute would deny the plaintiffs the equal protection of the laws. I agree with the majority that the organization plaintiffs lack standing to challenge the legislative scheme under either the First Amendment or the Equal Protection Clause. I also agree that no individual plaintiff alleges that any discrimination practiced by any of the defendant schools affects him or his children in a way that would give him standing to litigate the equal protection issue.

Finally, while I agree with the majority that plaintiff Lemon does and the other individual plaintiffs do not have standing to litigate the alleged violation of the Establish-

ment Clause on the basis of the requirements enunciated by the Supreme Court in *Flast v. Cohen,* 1967, 392 U. S. 83, my reasoning is somewhat different and leads to the conclusion that, except for Lemon, the individual plaintiffs lack standing under the Free Exercise Clause even more clearly than under the Establishment Clause.

In *Flast v. Cohen,* federal income taxpayers alleged that the expenditure of federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction in sectarian schools and to purchase educational materials for use in such schools violated the religion clauses of the First Amendment. The taxpayers' bill for a declaratory judgment and an injunction was dismissed by a three-judge district court for lack of standing. The Supreme Court reversed, holding that the plaintiffs had satisfied the requirements of a logical connection between their status as taxpayers and both "the type of legislative enactment attacked" and "the precise nature of the constitutional infringement alleged". 392 U. S. at 102. The Supreme Court relied principally on its finding that the Establishment Clause was designed to limit the taxing and spending powers of Congress and specifically declined to decide whether the taxpayers' free exercise claim alone would confer standing. 392 U. S. at 104 n. 25

In this case, the ultimate source of funds for the challenged payments under Act No. 109, and the only source, is the admission tax on harness races, 15 P. S. § 2606 (1967), and on thoroughbred races, 15 P. S. § 2656 (Supp. 1969). Plaintiff Lemon alleges that he has paid an admission fee to a harness race, including the tax. All three individual plaintiffs allege that "[i]t is against [their] religious conscience to be forced by operation of the taxing power into contributing to the propagation of religion or for the support of sectarian schools". The majority opinion apparently construes the latter allegation to mean that, except for Lemon, the individual plaintiffs have refrained from attend-

ing the races because to do so would require them to support parochial education. However, the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purposes of Act No. 109, and none of the individual plaintiffs has alleged any particular religions belief or any effect of Act No. 109 on the practice of a particular religion.

The individual plaintiffs other than Lemon can only be considered "taxpayers" within the scope of the standing requirements of *Flast v. Cohen,* if their "tax money is being extracted and spent in violation of specific constitutional protections. . . ." 392 U. S. at 106. The plaintiffs who have not attended horse races have not alleged that their "tax money is being extracted" by Act No. 109 unless by virtue of a theoretical increase in general tax requirements that might result from the failure to allocate racing revenues to general expenses. However, *Flast v. Cohen* pointed out that where a challenged tax operates "upon a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class". 392 U. S. at 104 n. 25. Although the Supreme Court was referring to taxpayer standing under the Free Exercise Clause in the quoted dictum, the required nexus between taxpayer status and "the type of legislative enactment attacked", 392 U. S. at 102, also depends on actual or threatened liability for a tax in a challenge under the Establishment Clause. In order to have "the requisite personal stake in the outcome", 392 U. S. at 101, the plaintiffs should have an established monetary interest in the relief sought, rather than an interest that will be realized only if judicial action enjoining expenditures supported by a particular tax program to which plaintiffs are not subject

shall result in a decrease in general tax burdens. Therefore, the individual plaintiffs other than Lemon do not have taxpayer standing to challenge Act No. 109 under either of the religious clauses because they do not contribute revenues disbursed under the Act, and are not "taxpayers within the affected class".

On the other hand, such a taxpayer as plaintiff Lemon, who is subject to the tax program that supports the particular statutory scheme sought to be enjoined, "may or may not have the requisite personal stake in the outcome. . . ." 392 U. S. at 101. Focusing upon the nexus between Lemon's status as a taxpayer and "the precise nature of the constitutional infringement alleged", 392 U. S. at 102, Lemon does complain that he has been required to contribute in support of an establishment. Although Lemon was not compelled to attend a harness race, he has been constrained by the state government to pay a tax on his attendance, a tax that is specifically earmarked by statute for purposes that allegedly support an establishment of religion. In view of the primary function of the Establishment Clause in restraining taxation and disbursement in support of religion, the tax Lemon has paid possesses a sufficient connection to the challenged expenditures under Act No. 109 and to the alleged Constitutional infirmity of the Act to lend the requisite specificity and adverseness to his claim. Accordingly, I conclude that plaintiff Lemon has standing to attack the validity of the legislation under the Establishment Clause.

As to all plaintiffs I would dismiss so much of the claim as alleges a violation of the equal protection clause because of lack of standing to sue. However, in my view, the allegations of the complaint disclose a legislative scheme violative of the Establishment Clause of the First Amendment, as to which plaintiff Lemon alone shows standing to

complain. As to Lemon's First Amendment claim, the motion to dismiss should be denied.

WILLIAM H. HASTIE,
Chief Judge, Court of Appeals
for the Third Circuit.

Supreme Court of the United States

No. 1189 ---- , *October Term, 19* 69

Alton J. Lemon, et al.,

Appellants,

v.

David H. Kurtzman, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.

APPEAL from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

April 20, 1970

Mr. Justice Marshall took no part in the consideration or decision of this order.